

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-16-10

(MANAGEMENT SERVICE DISCIPLINE)

DALE LUCHT,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, PUBLIC)	AND ORDER
EMPLOYEES RETIREMENT SYSTEM,)	
)	
Respondent.)	
)	

Neither party objected to the Recommended Order issued on September 9, 2011 by Administrative Law Judge (ALJ) Wendy L. Greenwald following a hearing conducted on December 7, 2010 and January 18, 2011, in Salem, Oregon. The hearing closed after the receipt of the post-hearing briefs on February 16, 2011.

Dale Lucht, Appellant, Portland, Oregon, appeared *pro se*.

Linda Kessel, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On October 11, 2010, the State of Oregon (State), Public Employee Retirement System (PERS) issued a three-week suspension without pay to Dale Lucht (Lucht), a management service employee. On November 10, 2010, Lucht filed a timely appeal of the discipline.

The issue presented for hearing is:

Was Appellant suspended without pay in violation of ORS 240.570(3)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDING OF FACTS

1. PERS is an agency of the State of Oregon, whose mission is to assist members in making "informed retirement and health benefit decisions and delivering retirement and health benefits effectively and efficiently."

2. Lucht worked as a principal executive manager D in PERS' Benefits Payments Division (BPD) since July 1, 2009. Lucht is responsible for managing the Benefit Application and Intake Section (BAIP), and supervises a principle executive manager B (PEMB) position and a seven-member technology team. Lucht's supervisory duties include interviewing applicants; recommending the hire of new staff; identifying and arranging training; assigning work; establishing work schedules; preparing and signing performance evaluations; recommending salary adjustments, transfers, and discipline; and responding to grievances.

3. Lucht's current supervisor is BPD Administrator Brian Harrington. Lucht has not received any prior discipline.

Background

4. Lucht believes that he and Harrington have not gotten along well since Lucht began his employment at PERS in 2003. When Lucht was originally hired, he worked under Harrington as a retirement counselor. Lucht did not enjoy this work, actively sought another position, and promoted out of Harrington's unit after seven months.

5. On December 12, 2005, Lucht was promoted into a management service position and assigned to manage two high-profile projects. At that time, Lucht and Harrington, who were at the same management level, sometimes were in conflict because Lucht hired some of Harrington's employees to work on his team; Lucht's projects were allocated resources differently; and, at one point, Harrington objected to Lucht requesting a legal opinion about an issue rather than resolving the issue internally.

6. Harrington was subsequently appointed as the administrator of Lucht's team and became Lucht's supervisor. On one occasion, Lucht and Harrington had a conflict over Lucht's reluctance to provide Harrington information on a specific case. Lucht had been concerned that his ability to finish his project on time might be affected. In September 2009, Harrington issued Lucht a performance review covering the period

June 12, 2008 to June 11, 2009. In the evaluation, Harrington determined that Lucht met or exceeded his job expectations in all areas. Harrington stated in the evaluation that the lack of flexibility in Lucht's projects sometimes constrained teamwork.

7. In 2009, Lucht completed his special projects, and Harrington asked Lucht if he wanted to remain in management service or work as a policy analyst 2, which is a non-management service position. Lucht chose to remain in management service and was appointed to his current position. Harrington and Lucht then discussed Lucht's role in his new position and Lucht assured Harrington he would be able to follow Harrington's priorities since he was now responsible to the division and no longer working on special projects.

8. Prior to the creation of the BAIP technology team, the technology employees were assigned to separate division managers. In response to an audit finding, the technology team was created and required to implement some new processes. As a result, some division managers complained that the technology team was unable to respond to their requests as quickly as they had previously, and the technology team employees felt they were constantly criticized about their work.

9. When Lucht discussed his concerns about the criticism of the technology team with Harrington, he did not believe that Harrington was sufficiently supportive. Several times Harrington did step in during staff meetings when Lucht's technology team was accused of failing to communicate. Harrington also scheduled a meeting with Lucht and a division manager who was very vocal about his unhappiness with the technology team's work and priorities. Lucht believed the conflict over the technology team resulted in on-going animosity with other division managers and left him feeling defensive.

Circumstances Leading to the Discipline

10. In March 2010,¹ Lucht met and went on one date with KO, who was employed by the Oregon Department of Employment (Employment Department) in a limited duration appointment.² KO and Lucht decided not to date again, but to remain friends and keep in touch about job possibilities at PERS. Based on her work background, Lucht thought KO might be a good fit for PERS. In late March and April, Lucht notified KO about two postings at PERS, neither of which were under his supervision.

¹All subsequent events occurred in 2010 unless otherwise indicated.

²We follow the example of the parties, who referred to this individual by her initials throughout the hearing.

11. Between April 1 and August 25, Lucht and KO exchanged approximately 500 non-state business related e-mails through the PERS information system.³ They e-mailed each other multiple times throughout most workdays during this time period. Thirty-seven of the 500 e-mails were sent during the hours of 12:00 p.m. to 1:00 p.m. In these 500 e-mails, Lucht and KO discussed various non-state business matters, such as how much longer they had in their work day, how their work day was going in general, their weekend activities, their after-work activities, people they were dating, Lucht's moving plans, their children, and other personal matters. They also made plans to meet each other for drinks, dinner, and the weekend, and for Lucht to work on KO's taxes. Over 200 of the 500 e-mails included no mention of Lucht's work. In many of the e-mails in which Lucht mentioned his work, they also communicated about purely personal matters.

12. Examples of some of the non-state business related e-mails that Lucht sent KO include:⁴

a. On April 12, Lucht wrote KO, “[f]eeling very unmotivated today.”

b. On April 23, Lucht wrote KO,

“[a]m trying to leave early have plans for drinks in a hot tub this afternoon. Have I project I can't leave till done and it is not going well. Maybe need a break have lunch and it will all sort out this afternoon. Enjoy your weekend. Next week only working Monday then off the rest of the week so I can move.”

c. On May 3, when KO e-mailed Lucht, “[i]n this Ilearn training, I want to kill myself :-{,” Lucht responded, “[y]es been there, done that. Try sticking a sharp object in your eye, its feels much better.”

d. On May 17, Lucht wrote KO, “[s]till enjoying the good feelings from the weekend. Warned staff not to ruin it for me.”

e. On May 28, KO asked if Lucht had any dates coming up. Lucht responded “[n]o nothing scheduled. I think I have three that we are discussing the idea of a date,

³The number of e-mails identified in this Findings of Fact is based on a count of the e-mails exchanged by Lucht and KO, which are included in Exhibit R-30. PERS reference to the 480 e-mails was based on a count of the e-mails listed in Lucht's "Sent Items" menu. The difference in these amounts is inconsequential to our decision.

⁴Unless otherwise specified, all communications between Lucht and KO discussed in this and subsequent findings occurred by e-mails sent to or received on PERS' information system.

only I somewhat interesting and has been hard to nail down for a date. The other two I haven't been trying to hard. [A]⁵ is a dumb ass, will check your profile tonight while I work on your taxes.”

f. On June 17, Lucht wrote KO, “[w]ow that was a great concert and an even better date, this was quite the week for me. Need to get to the beach and catch my breath. Don't work to hard, see you Friday. :)”

g. On July 6, Lucht wrote KO, “[w]ow big win. So far this week I have softball on Wed, cooking dinner for [L] on Thur, and a drink with [C] Fri after work. Then the whole weekend yet to plan.”⁶

13. Between April 1 and August 25, Lucht and KO exchanged approximately 200 additional e-mails in which they communicated about matters related to state business, including Lucht helping KO with her search for jobs at PERS and in other state agencies, the temporary position for which KO recommended her friend John Doe, the job rotation/WOC opportunity, and the recruitment for the permanent position.⁷ In many of these e-mails, they also discussed purely personal matters.

14. PERS managers who are not involved in a recruitment may encourage qualified individuals to apply for state positions or assist employees in filling out job applications.

15. On April 26, KO asked Lucht to give her suggestions about her resume in relation to a position she was applying for at PERS which was not under his supervision. They arranged to meet after work on April 27. KO suggested that they might also have time for a glass of wine. Lucht told her he would “go through your resume and see if there are any of the key words left out you should add. I will give you the run down on the job.”

16. On April 28, KO sent Lucht a brief e-mail thanking him for his help. Lucht responded that “I had a nice time too. I always enjoy our conversations. Glad to help you as I have my own selfish reasons to get you moved to our agency. We need to have some more nice relaxing evenings like that.”

⁵We use the first initial in place of the names of the people that Lucht and KO interacted with outside of work.

⁶The e-mails included in the findings are set out in their original form and have not been edited for spelling, grammar, or punctuation.

⁷John Doe is a pseudonym.

17. On May 3, KO asked Lucht if he was available that evening to help her fill out the new online job application and how long he thought the process would take. She suggested that they go to her house to use the computer to fill out the application and then go out to dinner. Lucht agreed to meet with KO and told her that the application should take less than 30 minutes.

18. On May 10, KO asked Lucht to help her get "some tips on the 'right' answers" for an interview she had for a job. They set a time to meet and Lucht told her he would "pull some standard state type questions to go over with you."

19. On May 11, Lucht and KO exchanged 12 e-mails, primarily about how their workdays were going. On May 12, Lucht and KO exchanged 22 e-mails, primarily about issues arising out of a training KO had attended. In one e-mail, Lucht indicated that he had been at a two-hour meeting, in which "some of my staff did not displayed the level of intelligence and judgement you would expect and now I have to deal with the fallout. The joys of being a manager." In later e-mails that day, they confirmed their plan to meet on May 13 to prepare KO for her interview.

20. On May 20, KO and Lucht exchanged 10 e-mails. They discussed whether the interviews had been scheduled for a PERS job that KO had applied for and their workday. They also made plans to meet that evening to talk about Lucht working on KO's taxes.

21. The morning of May 21, Lucht and KO exchanged 23 e-mails. They primarily discussed how they felt that morning and joked about an e-mail that one of KO's co-workers had sent Lucht by mistake. At one point, KO asked Lucht if he could find out how they were contacting applicants for interviews on a position she had applied for and Lucht told her that he would see what he could find out.

22. On May 27, Lucht and KO exchanged 11 e-mails, primarily discussing the prior evening and their workday. Lucht also told KO that he was going to be dealing with disciplining two staff members that day and they kidded each other about Lucht's ability to "kick ass." When KO e-mailed Lucht that she was not afraid of him, Lucht responded "I know but maybe you should be. You have no idea what diabolical plan that has been in the works for the last few months."

23. On May 28, Lucht and KO exchanged approximately 31 e-mails, 28 of which were either about personal matters or general workday comments. In one e-mail, Lucht told KO that

"[m]y boss has but an appointment for a kum by ya meeting with one of my other managers who is being a jerk. Why do I have to attend he is the one being a jerk. We don't 'just need to get along' he needs to be told shut up and do your job."

24. On May 28, Lucht disciplined an employee under his supervision with a one-step, two-month salary reduction. Lucht relied, in part, on the employee's personal use of the PERS information system over a period of approximately one year. The employee, who did not have a personal computer, had used the PERS information system to communicate with her daughter and family on a regular basis; to send jokes, at least one of which was offensive; and to contact someone about a car through Craigslist. Lucht found that the employee had violated the Acceptable Use of Information Systems Policy and the Personal Use of State Resources Policy "by using the state computer system and resources to avoid personal financial detriment. Your frequent non-work related communication between various friends and family on paid time does not meet the de minimus criteria in the policy because it interferes with your ability to do your work and is not infrequent in nature." Lucht also concluded that the employee had violated the Conflict of Interest and Standards of Conduct Policy by verifying her sister's account; violated the Release of Sensitive Information Policy by accessing a co-worker's account to determine her birthday without a business need; and violated the Information Security and Data Classification policies by misplacing and mishandling sensitive documents.

25. Sometime in June or July, Lucht met with PERS HR Manager Susan Korn to discuss his concerns about the stress the technology team was under and ways to change this dynamic.

26. On June 15, Lucht and KO exchanged 27 e-mails. They discussed such matters as their plans to meet at Lucht's beach house that weekend, a reference Lucht was writing, their opinion about references, their work schedules, and the people they were dating. After KO mentioned that six adjudicators had been laid off in the Employment Department, Lucht responded "[h]ang in there if Donna [Duff] does not mess up her interview tomorrow may have an opening here right directly. Been coaching her all day." Duff, who worked in the PEMB position Lucht supervised, had applied for a position in another agency. Lucht is the hiring manager for the PEMB position.

27. During the June 19 weekend, KO and some of her friends visited Lucht at his beach house.

28. On June 23, Lucht and KO exchanged seven e-mails. At one point, Lucht e-mailed KO that "[y]ou need to start working on your resume right now." When KO responded "[r]eally???? Any news:)," Lucht replied, "[y]es, I will be going to HR right before lunch to start the paper work." Lucht suggested that KO call him to discuss the details.

29. Soon after Lucht learned Duff would be leaving, he met with Harrington to discuss the recruitment for the PEMB position.⁸ Lucht was concerned about having a vacancy just prior to PERS' July workload increase and proposed to fill the vacancy on a temporary basis during the recruitment through a job rotation or work-out-of class (WOC) position. Harrington and Lucht discussed a number of possible internal candidates for the WOC position, but were unable to identify anyone they thought was acceptable. Lucht told Harrington that he thought KO, who worked at the Employment Department, would be a good match for the PEMB position. Lucht explained that he had dated KO at one point, but they were now just friends. Harrington did not raise a concern about Lucht's friendship with KO. They decided that Lucht should bring KO in for an informal meeting with other staff.

30. A WOC position is not filled through a formal recruitment. A manager with a vacancy can assign WOC duties to an employee with his/her manager's and budget approval. If a manager wants to bring an employee in from another agency, an interagency agreement must be arranged between the sending and receiving agencies.

31. On Friday, June 25, KO attended an informal interview with Lucht, PEMB manager Duff, Interim Retirement Services Section (RSS) Manager Jeff Cunningham, and three BAIP employees, Christine Vanderhoof, Kathleen Matrilla, and Kara Scott.

32. Around this time, Lucht also met with HR Manager Korn to discuss filling the PEMB position through an interagency job rotation with the Employment Department. Lucht told her he was considering KO, who he had met on a date several months prior but was now just a friend, and asked if this was a problem. Korn did not indicate that Lucht's friendship with KO was a problem.

33. On June 28, Lucht and KO exchanged 11 e-mails. In addition to discussing personal matters, Lucht told KO "I do need you to go into NeoGov and print off you application and send it to me to turn into HR. Have started the ball rolling on this end." In response, KO faxed Lucht her application, asked him to look at it before he turned it in, and suggested that he interview her at 7:30 a.m. Lucht responded that "[l]ooks good I am going to drop off at HR. sound like a good time for a breakfast interview."

⁸Harrington testified that he did not recall having this conversation before he went on vacation. However, he acknowledged that he was aware that KO was coming in for the informal interview prior to going on vacation. Therefore, Harrington and Lucht must have discussed filling the PEMB position during the recruitment prior to Harrington's vacation.

34. On June 29, Lucht met with the participants from KO's informal interview to discuss their impressions of KO. The group told Lucht they were concerned with KO's lack of PERS experience and her ability to work and communicate with other employees on her team and other teams. They explained to Lucht that their concerns were based on KO's failure to respond to their question about how she would deal with roadblocks, the fact that she did not seem to understand the word roadblock, and her answer that she would use alcohol to deal with job stress, which they felt was inappropriate. The group also discussed the pros and cons of potential PERS employees and the possibility of bringing in another supervisor to fill the PEMB position during the recruitment. The group did not agree on any of the options as being the best.⁹ Lucht understood that the group felt there was no perfect solution, but it was worth giving KO a chance.

35. On approximately June 30, Korn notified Lucht that a PERS employee had expressed interest in the PEMB WOC position. Lucht informally interviewed that employee and decided she did not have sufficient experience for the interim position. When he notified Korn of his conclusion, Korn suggested that other internal candidates might be interested in the WOC position. Lucht agreed to post the WOC position for internal candidates. He did not tell Korn that he and Harrington had been unable to come up with a good internal candidate. Korn also told Lucht to instruct KO to submit an application, and that she would contact the Employment Department to determine if they would be willing to enter into an interagency agreement.

36. On July 1, PERS sent out the WOC announcement for the PEMB position to PERS staff. Lucht also sent KO a copy of the announcement.

37. On July 2, Lucht and KO exchanged five e-mails. At one point KO stated "I was just reading the work out of class notification. Should I ask my manager or just let it go?....we are almost there!!" Lucht responded by asking KO to call him.

38. On July 6, Lucht and KO exchanged 18 e-mails, primarily about their weekend activities and Lucht's housing options. When KO e-mailed that she needed a day to recover from her weekend, Lucht responded "I am nice and relaxed, the beach trip did me good. Already cranking out lots of stuff today. When you work for me there will not be any of this early morning slaking off (LOL)." KO replied "[y]es Sir (salute) :) When oh when.... I was kinda thinking I should take some vacation because once I start, I don't want to take any time off. If I'm gonna land it permanent I don't want to miss anything."

⁹Lucht asserts that Duff's and Cunningham's testimony that the group did not agree KO was the best candidate is not credible because their recollection of the meeting was different. However, Duff's and Cunningham's testimony was sufficiently similar to be credible. It was also consistent with the concerns expressed by the meeting participants about KO and consistent with Lucht's testimony that the group agreed there was no perfect solution.

39. Lucht had directed the internal applicants for the WOC position to answer test questions. On July 7, Lucht e-mailed KO the test questions, and stated

"I am having all my internal candidates answer these three test questions. If you could fill them out also it will give me a basis to show how much more qualified you are than the others. I am planning to get this issue closed on Fri morning. Would do it Thur afternoon but will be leaving work early to spend more time with [L]."

Later that day, when KO asked Lucht if the permanent recruitment for the PEMB position had been posted, Lucht responded that he was trying to get an update on when it would be posted and would let her know. When KO asked "[a]nything else on the temp news?" Lucht responded "[n]o one I am interested in has applied yet." KO responded "[n]ot even me ;)" and Lucht responded, "[y]ou don't have to apply to be interesting."

40. On July 8, Lucht and KO exchanged 13 e-mails. Lucht first e-mailed KO that he was leaving early that day "to meet [L] and fix her dinner," to which KO replied "[y]ou dog....the rest of us have to work!!! I wish I could leave early. I AM NOT in the mood." Lucht then e-mailed KO that "I do have to sit through a 3 hour exec meeting this morning I will be worthless after that anyway. Noon today is the cutoff for people to submit their request to be considered for the WOC. So far just 4 and none am I considering, In fact 2 and maybe 3 of them won't meet MQs [minimum qualifications]."

Later that morning, Lucht notified KO that the "[a]ctual job position should be out either tomorrow or Monday." After KO asked how long the process would take, he described the six to eight week process for the permanent recruitment. At 11:18 a.m. that day, KO sent Lucht an attachment with her responses to the WOC test questions, stating, "[r]ead this....please get back to me on what you think, do I need to fix something or add anything.....just a first draft, open to suggestions. :)" At 11:57 a.m., KO sent Lucht an attachment entitled "PEMB temp test questions.doc."

41. On July 9, the PEMB permanent position was posted.

42. That day, Lucht and KO exchanged 15 e-mails. Initially, they talked about doing something that evening. KO also suggested that they skip work and talk about Lucht's prior evening over breakfast and then asked "[w]hen will I know if I have been chosen for this job? Is there something official? I saw your text this morning....what went wrong?" Lucht responded that "yea breakfast sounds good, my only important task is working with HR to get this temp hiring thing going, Im sure you don't care about that. Last night was fine except it was crap, did not like the head games. But does have an interesting story to share." KO replied that "I will leave you aloneget the temp thing

done!!! :):) :).” They then exchanged a couple of e-mails about the date Lucht had gone on the prior night and Lucht’s multi-tasking at work. Lucht then told KO that the PEMB permanent position had been posted. After KO looked at the posting, she asked when he was adding the written questions. Lucht responded, “I will probably just bend them into the interview. Hopefully I am able to sort the list from these questions and do just 1 round to speed the process up.”

43. That day, Lucht met with HR Director Helen Bamford about the WOC recruitment.¹⁰ Lucht told Bamford that he had reviewed the test questions for the four internal candidates and KO, and explained why he was not interested in any of the internal candidates for the temporary appointment. Bamford and Lucht discussed the pros and cons of the internal candidates and Bamford challenged Lucht on some of his conclusions. She told Lucht she thought Jim Smith¹¹ was a good candidate because he was knowledgeable about PERS. Bamford had not reviewed the test questions.

Lucht said he thought KO was the best candidate because she had years of management experience and the staff who informally interviewed KO thought she would be a good fit. He also told Bamford he had dated KO in March 2010, but it did not work out and they remained friends. Bamford did not express any concerns about this information. Bamford told Lucht that he would need to work with Harrington to make the decision. Bamford believed that once Lucht had reviewed the list for the WOC position, it was appropriate for him to formulate an opinion about the candidates.

44. Harrington returned from vacation on July 12. That day, Lucht told Harrington that the informal interview with KO had gone well and everyone liked her. Lucht also told Harrington that the internal recruitment for the WOC position had not gone well and he had met with HR Director Bamford, who agreed there were no viable internal candidates and KO was the best applicant. Harrington told Lucht he could move forward with bringing KO in on the job rotation and signed the form initiating the interagency transfer process. After talking with Harrington, Lucht notified KO that she should start working with her agency on the interagency transfer.

¹⁰Bamford testified that she talked with Lucht on July 14. Although it is not critical to our decision, we find that Bamford met with Lucht on July 9 to discuss the candidates. The deadline for the internal candidates’ applications was noon on July 8. In an e-mail exchange on July 9, Lucht asked Bamford to meet about the applicants; she replied that he should come by “now if you can,” and he responded “[o]n my way.” Bamford also remembered that Lucht left work early on the day they met, and Lucht’s July 9 e-mail reflects that he left at noon that day. Finally, both Lucht and Harrington testified that they discussed Lucht’s meeting with Bamford on July 12, after Harrington returned from vacation.

¹¹Jim Smith is a pseudonym.

45. On July 12, Lucht and KO exchanged 17 e-mails about KO's activities the prior night, Lucht's workday, and a temporary position for which KO had recommended her friend Doe. That afternoon, KO asked Lucht whether she needed to "do anything to my application before I apply for the job permanently? Or can I send it over?" Lucht responded: "It think it is really good, just answer the supplemental questions well."

46. On July 13, Lucht and KO exchanged 22 e-mails, most of them about people they were dating. Lucht also sent KO an e-mail, which he signed "Your Boss," stating

"[t]ime to start as a manager here. So tell me is [Jane Jones]¹² someone you would want to work for you. And if so what exactly would be her job skills to be successful. The two of us are going to need some more temporary staff and I was thinking I might be able to orchestrate a job rotation for her. It would be limited to 8 months but would increase her chances of actually getting on her permanently in that time."

Later, Lucht told KO, "[s]o we need a person on your team," and described what the job would entail. In response to a question from KO, Lucht stated, "[y]es besides [Doe], may need up to 5 people." KO responded, "I am sooooo anxious to get to work and have a project. Will we have a clue when tomorrow?"

47. That day, KO e-mailed a personal friend that she had a new job as a "manager of operations in the PERS division." She told him she was hoping that Thursday would be her last day in her current position, but she would not know for sure until the next day.

48. Also on July 13, Bamford told Harrington that she had discussed the list of candidates for the WOC recruitment with Lucht. She told Lucht that she thought Smith would be a good interim supervisor until the permanent recruitment was completed because he was already knowledgeable about PERS, but it was Lucht's decision. She also told Harrington that Lucht told her he was concerned about Smith and felt KO was best.

49. Later that day, Harrington contacted Duff at her new job to ask about her impressions of the informal interview with KO. Duff told Harrington that she had concerns because KO did not answer all of the questions, did not understand what a roadblock meant, and did not have prior state management experience. Duff also said

¹²Jane Jones is a pseudonym.

that when she raised these concerns with Lucht, she was surprised when he responded that the term roadblock was a PERS technical term, which was why KO did not understand it.

50. On July 14, Lucht and KO exchanged 15 e-mails. After Lucht mentioned some of the specific work issues he was dealing with, KO asked “[w]hat business plans what are you plotting? :) I am sooooo bored I want to kill myself!!!” Lucht replied “[d]on’t worry, once you get here you will have plenty to do. Part of it might be covering for your boss, I hear he almost never works a full day (LOL).” When KO e-mailed that she wished she had news about the job, Lucht told her that he would check with HR the next morning.

51. On July 15, Lucht e-mailed Harrington and asked him to stop by to talk.

52. On either July 15 or 16, Harrington met with Lucht and told him that he heard concerns about KO and felt it was best not to hire her for the WOC position.¹³ Harrington agreed that there was no viable internal candidates for the WOC. Harrington proposed they cancel the recruitment for the WOC position and consider KO as part of the pool of candidates for the permanent recruitment. Lucht told Harrington that KO was head and shoulders above everyone else, they should not pass on her, and she would be the best candidate in the permanent recruitment. That day, PERS’ HR also notified the Employment Department that it would not be pursuing the interagency transfer.

53. On July 16, Lucht forwarded to KO an e-mail he received from PERS Specialty Services Section (SSS) Manager Peter Urgern about processing death intakes and a concern that there was not much communication about this subject. Lucht told KO “[i]f Brian [Harrington] does not approve you coming over this is the kind of s__t he will have to accept. I know the problem and do not have the time to go fix it so death processing will go down the tubes.” Later that morning, KO forwarded her friend Doe’s resume to Lucht. Lucht responded “[l]ooks perfect, I will start working on this next week once I get your stuff cleaned up and you over here.”

¹³Harrington testified, based on the date on his notes of his meeting with Lucht, that he told Lucht he was cancelling the WOC position on July 13. Lucht testified that the meeting was on July 15, relying on an e-mail he sent asking Harrington to stop by that day. However, on July 14, 15, and even the morning of July 16, Lucht sent e-mails to KO which reflect he still believed she would be filling the WOC position and was just waiting for Harrington’s final approval. It is after that time that their e-mail discussions show that the WOC position is in doubt. In addition, it is on July 16 that PERS cancelled the interagency transfer with the Employment Department. Therefore, we conclude while Harrington may have met with Lucht about the WOC position on July 13, he did not tell Lucht that he was cancelling the WOC position until July 15 or 16.

54. That day, Harrington contacted RSS Manager Cunningham to ask about his impressions of KO during the informal interview. Cunningham responded that he was concerned about KO being a good fit. Cunningham explained that he did not think it was appropriate that KO answered a question about how she dealt with stress by responding "alcohol," and she didn't respond well when asked how she dealt with backlogs.

55. On July 19, Lucht and KO exchanged 15 e-mails. Lucht initially sent an e-mail entitled "Executing the plan," and told KO "I will talk to Brian [Harrington] this morning and see if I can get out new plan off the ground. Also can you forward this attachment to [Doe] and have him mail it back to me. Then with that and his on line application you were going to send me I can get the paper work started on him." KO responded "[w]ow you are up bright and early!!! I'll get going :) We will beat them at their own game. Remember you get more bees with honey! :)"

Later that morning, Lucht e-mailed KO that he had "presented the plan, not sure yet if he is going to approve it." After KO asked how Harrington had responded, Lucht replied that "[i]t was a blank reaction, kind of like a deer in the headlights. Will keep you updated once he gives me some actual feedback." When KO responded, "[t]his guy is not the brightest bulb is he? Kinda hard to communicate with someone who can't think on their feet. It's like pulling teeth. No wonder things move so slow," Lucht replied, "[t]hat's when things move at all." That afternoon, KO e-mailed Lucht that her director had received the staffing request and was going to talk to Employment Department HR to see if anything could be done.

56. On July 20, Lucht and KO exchanged 11 e-mails. At one point, after KO suggested that Lucht remove her name as a reference for Doe, Lucht responded "what a mess this has become. I am going to schedule a meeting with my HR director to make sure there are not unfounded rumors going around that are affecting my reputation here."

57. That day, another employee in KO's office, sent an e-mail to his union representative asking whether anything could be done about PERS' decision to not hire KO into the temporary PEMB position. He explained, in part, "[s]he has over 25 years experience and is well qualified for the position. There were five applicants four of which did not meet the minimum qualifications. The fifth applicant had worked in the position prior and is not longer there for failure to be able to do the job."

58. On July 21, KO e-mailed Lucht that she thought they should drop the attempt to place her in the WOC position since:

"I have applied for the position and I think a formal interview could show that I am qualified. Also, I don't want to start out as a trouble maker or with a bad reputation. I am afraid all this drama may kick me out of being a candidate. I don't want it to turn into some weird power struggle and have 2 strikes against me from the start. Any thoughts."

Lucht responded that he thought she was correct.

59. On July 22, Lucht and KO exchanged 16 e-mails about a variety of matters, including what they were doing at work, whether he received a fax she had sent him, the people they were dating that weekend, and other weekend plans. KO also asked Lucht if he could meet her for breakfast on Saturday, but Lucht replied he was too busy. At one point during these communications, Lucht e-mailed KO, "[p]robably should work on getting my interview questions ready for the PEMB interviews."

60. On July 23, Lucht e-mailed KO "[l]ets kick a__ so we can get this weekend started." They also exchanged 14 additional e-mails about several women Lucht was dating, KO's plans for that afternoon and weekend, and whether they should go see Lucht's cousin's band that night.

61. On July 26, Lucht and KO exchanged 12 e-mails. Lucht initially e-mailed KO, "[g]lad you had a good weekend, lets kick some ass today." KO responded "[t]hat's what I like to hear!!! You must have had lots of s_x!!:) You sound like you are in a good mood.:)" Lucht responded with information about his weekend and they discussed his plans for the next week. Later, Lucht e-mailed KO "[w]ow I seems to be on top of almost everything today. Even getting interview questions all prepped hoping I get me list of applicants for HR today so I can set interview dates." When KO asked "[a]m I going to get an interview," Lucht replied "[s]till waiting for list of applicants so I can figure out who I want to invite for interviews." Not long after this exchange, KO sent Lucht the following five interview questions:

"Give me a specific instance when you cross trained staff to do more then one job and how the jobs related to each other.

"Give a specific example of how you managed the staff after they were crossed trained to optimize performance.

"Give me a specific example of a time that you evaluated a process and implemented a change for the better, and how you got [sic] you implemented the change.

“Where have you managed that you depended on another department to hand over work and how you worked together?”

“Have you managed an environment where you were either waiting for documentation or someone was waiting for documentation from you, and how did you handle it when that documentation was held up?”

After receiving the interview questions from KO, Lucht replied, “yes you are on target with your questions, exactly what needs to be asked.” When KO responded, “[m]ight narrow the field,” Lucht wrote back, “[n]eed to narrow it to just one.” After this, KO e-mailed Lucht that she liked how he thought and they then arranged to meet that week after work.

62. On July 27, Lucht and KO exchanged 12 e-mails about a variety of matters, including their work, people they were dating, Lucht’s vacation plans, and other personal matters.

63. On July 28, Lucht and KO exchanged 22 e-mails about a variety of matters, including the status of Doe’s temporary position, Lucht’s vacation plans, KO’s daughter, and meeting for a drink after work.

64. On July 29, Lucht and KO exchanged 20 e-mails about a variety of matters, including Lucht’s baseball game and where they would meet that night. At one point, when KO asked, “[a]re you getting your list,” Lucht responded “[s]uppose to get it sometime this morning. Want to see if I can get set up for interviews before I leave today.”

65. On July 30, Lucht and KO exchanged 24 e-mails, primarily about making plans to have dinner together. That day, Lucht sent HR the questions he had prepared for the interviews. One question was

“[d]escribe an experience in which the completion of your team’s work was depended [*sic*] on a person or group of people outside your supervision in which your needs were not being met for your team to be successful. How did you deal with the situation and what was the final resolution to the problem?”

66. On August 4, Lucht and KO exchanged three e-mails, primarily about a plan to get together with others one evening that week. That day, former PEMB manager Duff contacted Bamford. Duff told Bamford that a PERS employee who had been an applicant for the WOC position told Duff he felt it was unfair that he was not interviewed for the WOC position and would file a grievance if KO, who he referred to

as Lucht's girlfriend, was allowed to transfer into the position. Bamford then asked Duff about her impressions of KO's informal interview. Duff told Bamford that she did not think KO would be a good candidate and that she told Lucht this. Duff said she did not feel good about KO based on KO's comment that she would use alcohol to handle stress. Duff also told Bamford that she was concerned because, in her experience, Lucht was sometimes very determined to get his own way. Bamford was surprised by Duff's comments because of what Lucht had told her about the informal interview process.

67. HR Analyst Evanthia Hazapis, Korn, and Bamford hold weekly or bi-weekly HR meetings to discuss various issues. During one or more of these meetings prior to August 11, they discussed the PEMB WOC position and Lucht's attempts to hire KO into that position. The topic came up, in part, because Bamford felt uneasy because Lucht was so persistent in pursuing KO for that position, even after she had challenged his conclusions about the internal candidates. Bamford also brought up her conversation with Duff. Korn shared her concern about Lucht's persistence and they discussed whether they should further pursue the issue.

68. On August 9, Lucht and KO exchanged five e-mails about Lucht's schedule that day, how he hurt his ribs exercising the prior night, and whether they would go to the beach together on Friday.

69. All 16 applicants for the permanent PEMB position received perfect scores on the supplemental questions and were offered interviews. The interviews were held on August 10, 11, and 17.

70. On August 10, Lucht and KO exchanged 11 e-mails. Lucht stated that he would conduct interviews that day and they talked about the arrangements for Lucht's birthday party the next evening, which KO had helped plan.

71. HR Analyst Hazapis and Lucht met to discuss HR matters every Wednesday. When she met with Lucht on August 11, she noticed five or six e-mails from KO on Lucht's computer. Since the WOC position had been cancelled, Hazapis thought it odd that a hiring manager was e-mailing an applicant shortly before the interviews for the permanent position. Hazapis discussed her concerns with Korn. Korn directed Hazapis to request Lucht's e-mails from PERS' Information Services. Hazapis received copies of Lucht's e-mails on August 13, 18, and 31.

72. On August 16, Lucht and KO exchanged five e-mails about how they were feeling and KO's attempts to find an e-mail she had sent him.

73. After reviewing Lucht's e-mails, Hazapis determined that KO and Lucht had exchanged hundreds of personal e-mails. When it appeared some e-mails were missing, Korn requested the missing e-mails from the Employment Department.

74. The hiring panel for the PEMB permanent position included Lucht, Harrington, SSS Manager Unger, and BAIP employee Scott. During the interview process, Lucht stated several times that a second interview would not be held if it could be helped. Harrington responded that there might be a need for a second interview if there was no clear decision. The panel scored the top four applicants as follows:

	Lucht	Harrington	Unger	Scott	Average
Candidate 1	53	73	84	77	71.75
Candidate 2	70	72	76	82	75.00
Candidate 3	79	80	78	86	80.75
KO	90	72	75	79	79.00

75. The panel scored KO on the eight interview questions as follows:

	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Q8	Total
Lucht	16	20	8	10	15	8	8	5	90
Harrington	14	14	6	7	12	7	8	4	72
Unger	12	15	8	8	14	9	4	5	75
Scott	14	16	9	6	15	8	6	5	79

76. A PERS hiring panel normally meets and reviews the results of the interview process before making a final decision. At this meeting, panel members generally discuss the applicants' scores and, when the scores are close, consider whether a second interview is appropriate.

77. After the scores for the PEMB position were tabulated, Lucht told Korn that two candidates' scores were very close and asked if a second interview would be appropriate. They talked about the reasons for a second interview and, in general terms, when a second interview was appropriate and when it was not. Based on their discussion, Korn understood that Lucht intended to pursue a second interview. When he spoke with Lucht, Korn was unaware of the individual candidates's rankings.

78. On August 18, Lucht provided the tabulated scores to the hiring panel and notified them that he had

“highlighted the questions where there seemed to be significant discrepancies in our scoring. Will schedule a meeting for Monday so we can sit down and discuss our scoring of these questions and some of our concerns that led to the different opinions. We can then decide if we have a clear choice or if a second round is needed and what are the issues we need further clarification on to make a decision.”

79. At the meeting, the panel members discussed the pros and cons of the candidates, the candidates' answers, and whether a second interview was appropriate. At the conclusion of the meeting, the panel decided a second interview was not necessary and that Candidate 3 would be offered the position. Lucht had HR check Candidate 3's references.

80. On August 30, Korn and Hazapis conducted an investigatory interview with Lucht. During the interview, Lucht stated that he did not give KO special treatment during the hiring process. When Korn asked about the e-mails on July 6, 7, and 8 which referenced the WOC process, Lucht replied that he had been joking when he wrote “[w]hen you work for me” and asked KO to fill out the test questions to “give me a basis to show how much more qualified you are than the others.” He explained he had clearly communicated with KO that there were no promises or guarantees on the job, KO knew he wanted to hire the best, and he only provided KO with the information about the others who had applied to keep her informed. In regard to the e-mail in which KO asked him to review her test questions, Lucht stated he thought he had just accepted them because reviewing them would have been inappropriate. When Korn asked Lucht about his discussion with Bamford about hiring KO in the temporary position, he first responded that Bamford said she felt KO was the “best route.” He then stated “maybe [Bamford] didn't say it that way but left it up to him to make decision.” In regard to a question about his e-mail on July 13, which he signed “Your Boss,” Lucht replied that he was being sarcastic and just seeing how she would respond to a hypothetical about hiring temporary employees.

In discussing the e-mails which referenced the permanent recruitment, Korn asked Lucht about the interview questions KO sent him on July 26. Lucht stated that KO had submitted the questions on her own and he did not use them, but came up with his own questions. He also said that his statement about needing to narrow the field to just one did not refer specifically to KO. He stated that he did not think about whether KO sending the questions was inappropriate and, if it was inappropriate, she probably did it because she did not have State experience. When they asked Lucht about the July 19 e-mail entitled “Executing the plan,” Lucht explained that he was just bouncing ideas off of KO and the discussion concerning “our plan” was about a BAIP plan. After he was shown over 400 e-mails he had sent KO between March 31 and August 30, he explained that the e-mails provided “stress relief” and that he had been frustrated and used KO as

a “sounding board” to deal with the fact he worked in a “hostile working environment.” At the end of the meeting, Lucht said he was a good manager “but perhaps stress caused him to have bad judgment.”

81. On September 2, Lucht submitted a written statement setting out what he could recall of the recruitment process and his connection with KO. In it, Lucht explained that any similarity between his and KO’s interview questions was because KO understood the characteristics and experience needed in a good manager. He stated further that

“[t]here was never an attempt on my part to circumvent and [sic] process here only to try and hire the best person for the position. During the process of trying to do the job rotation, a process that is not as defined and can occur differently depending on the situation, things may have gotten a little messed up due things [sic] changing midstream several times when I thought everyone was on the same page. If at anytime in the process anyone had expressed a concern over the hiring due to my friendship with [KO] I would have stopped the process right then. The feedback I kept getting was it was OK up till when [Harrington] stopped the process and I then guessed, although [Harrington] did not tell me this, it was being stopped for that very reason.”

82. On September 24, PERS issued Lucht a pre-disciplinary notice. A pre-disciplinary hearing was held on September 30.

83. Effective October 11, PERS suspended Lucht without pay for three weeks for inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily. In the statement of facts that supported the discipline, PERS included a number of the e-mails that it found objectionable, and stated in part:

“During the investigatory meeting with HR on August 30, 2010, you were shown screen shots of approximately 480 emails you sent to KO between March 31, 2010 and August 30, 2010 illustrating that you conversed on almost a daily basis and multiple times throughout the day. The amount of email between you and KO is non [sic] de minimus and mostly personal in nature. When asked about the volume of emails, you stated ‘large amount were personal and some were not...I’d have to categorize them and read all of them.’ The content of some of the email depicted the BPD Administrator with disrespect and may have adversely affected KO’s confidence in someone for whom she may work, if she was hired by PERS. Emails to KO indicate that you were developing or maintaining a relationship that affected your ability to make objective business decisions.”

The summary section of the discipline letter stated, in part, as follows:

“You did not demonstrate good judgment as a hiring manager in your email communication with a personal friend who you knew was an applicant in an open and competitive recruitment. Despite your contention that you made it clear to her that you wanted to hire the best, there are no emails to demonstrate the objectivity we would expect from a hiring manager. Rather, you created a perception in public record that she would be working at PERS by telling her it’s time to start being a manager, signing emails, ‘Your Boss’, and making references to when she would be working for you. She communicated her understanding that she would be working at PERS to a co-worker who alleged discrimination on her behalf to a local union when PERS did not pursue an inter agency job rotation.

“It is acknowledged that you did not solicit interview questions from KO; however, you accepted them. You failed to recognize that her decision to offer unsolicited interview questions did not demonstrate acceptable management practices in either public or private sector. You also attempted to extend the interview process to get different results despite the rankings of three other panel members. You violated the Conflict of Interest policy by losing impartiality and giving preferential treatment to a candidate.

“You knowingly violated the Acceptable Use of Information Systems and the Personal Use of State Resources policies. Neither you nor KO demonstrated appropriate behavior by exchanging over 400 personal emails on work time over a 6 month period. As a manager, you are responsible for enforcing the policy with your employees. You also demonstrated poor judgment and violated the Maintaining Professional Workplace policy when you expressed your frustration with your supervisor to KO in disrespectful terms causing her to perceive the BPD Administrator in a nonprofessional manner.

“By not being able or willing to address KO’s inappropriate email activity and unsolicited interview questions during the recruitment process, we have no confidence that you would be willing or able to address inappropriate behavior had she been the successful candidate.

“You have demonstrated an inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily.”

Relevant Policies

84. On March 5, 2007, Lucht signed a statement indicating his understanding of PERS' "Conflict of Interest and Standards of Conduct" policy and that a violation of the policy could result in disciplinary action up to and including dismissal. The policy directs employees to avoid

"any action which might result in or reasonably be expected to create the appearance of:

- "a. using public office for private gain,
- "b. giving preferential treatment to any person or entity,
- "c. impeding department efficiency or economy,
- "d. losing complete independence or impartiality,
- "e. making a departmental decision outside of official channels, or
- "f. affecting adversely the confidence of the public and/or membership in the integrity of the fund and the state."

85. PERS follows the Department of Administrative Services' policy on "Maintaining a Professional Workplace," which provides 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." On January 28, 2010, Lucht signed a document acknowledging his understanding that violation of this policy could result in disciplinary action up to and including dismissal. The policy directs that, "[e]mployees at every level of the agency should foster an environment that encourages professionalism and discourages disrespectful behavior. All employees are expected to behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior." The policy also gives examples of inappropriate workplace behavior, which includes "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."

86. On February 3, 2005 and May 6, 2010, Lucht received training on PERS' "Acceptable Use of Information Systems" policy and signed a statement indicating his understanding that a violation of the policy could result in disciplinary action up to and including dismissal. The policy outlines acceptable uses of the PERS' information systems as follow:

"PERS provides users with information and system resources to conduct business for the state of Oregon. Any use of information and/or systems must comply with this policy. Business use includes accessing information related to an employee's assigned duties and employment with the state,
* * *"

The policy further states that:

“E-mail is to be used for state business. Employees are allowed limited, incidental personal use during their lunch breaks only as long as there is no or insignificant cost to the state (see Personal Use of State Resources policy, 1.01.00.00.031) and such use does not violate the other provisions of this policy. * * * E-mails are public record and all individuals are responsible for ensuring compliance with archiving and public records laws.”

87. On May 6, 2010, Lucht also received training on PERS’ “Personal Use of State Resources” policy and signed a statement indicating his understanding that violation of the policy could result in disciplinary action up to and including dismissal. The policy provides that

“PERS’ resources and facilities are to be used to support its business, services, and administrative functions. The use of PERS’ resources and facilities for the conduct of outside work and personal use is strictly prohibited. Outside of stated exceptions to this policy, using PERS’ property for personal use or private financial gain is a misappropriation of state assets which violate the state’s ethics law.”

Under the list of prohibited uses, the policy specifically states that “PERS computing and Internet resources used in violation of the Acceptable Use of Information Systems policy” was prohibited. The policy also includes specific criteria for personal use, as follows:

“Occasional limited *de minimis* personal use of PERS’ resources and facilities is permitted only if all six of the following conditions are met:

1. there is little or no cost to the state;
2. use is brief in duration, occurs infrequently, and is the most effective use of time or resources;
3. use does not interfere with the performance of the employee’s official duties;
4. use does not disrupt or distract from the conduct of state business due to volume or frequency;

5. use does not disrupt other state employees and does not obligate them to make a personal use of state resources; and
6. use does not compromise the security or integrity of state property, information, or software.” (Emphasis in original.)

The policy defines the word *de minimis* as “lacking significance or importance: so minor as to merit disregard.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Department’s three-week suspension of Lucht without pay did not violate ORS 240.570(3).

Standards of Proof

Management service employees are subject to a range of discipline, including suspension, “if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” ORS 240.570(3). The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). OAR 115-045-0030(6). The employer meets its burden of proof if this Board determines, under all of the circumstances, that its actions were “objectively reasonable.” *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981); *Morissette v. Children’s Services Division*, Case No. 1410 at 23 (March 1983).

In applying the “objectively reasonable” standard to management service discipline cases, an employer may 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 this Board’s consideration is

“the extent to which the employer’s trust and confidence in the employe have been harmed and, therefore, the extent to which the employe’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 employe’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.)

Management service disciplinary action is reviewed under a two-step process. First, since a reasonable employer is one who “disciplines employees in good faith and for cause,” the employer must first prove the charges which are the basis of the discipline. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8 (June 2001). The employer need not prove all of the charges on which it relies. *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 15 (October 2001). Second, the employer must demonstrate that the level of discipline imposed was objectively reasonable. A reasonable employer “imposes sanctions that are proportionate to the offense; considers the employee’s length of service and service record; and applies the principles of progressive discipline.” *Smith* at 8-9. However, a reasonable employer may not be required to use progressive discipline “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).

Basis for the Discipline

PERS suspended Lucht for: (1) violating the Acceptable Use of Information Systems and Personal Use of State Resources policies by exchanging hundreds of personal e-mails during work time over a six-month period using the PERS’ information system; (2) failing to use good judgment and violating the Maintaining Professional Workplace policy by referring to Harrington disrespectfully in e-mails to KO; (3) violating the Conflict of Interest policy by losing impartiality and giving preferential treatment to a candidate; and (4) failing to demonstrate good judgment as a hiring manager in e-mail communications with a personal friend who was an applicant in an open recruitment.

(1) Acceptable Use of Information Systems and Personal Use of State Resources Policies

Lucht violated the Acceptable Use of Information Systems and Personal Use of State Resources policies. The Acceptable Use of Information Systems policy provides that the PERS information system is to be used for state business, which is defined as “accessing information related to an employee’s assigned duties and employment with the state.” This policy also limits employees personal e-mail use on the PERS system to “limited, incidental personal use during their lunch break only.” The Personal Use of State Resources policy provides for “limited *de minimis* personal use of PERS’s resources,” which “occurs infrequently” and is “lacking significance or importance: so minor as to merit disregard.” (Emphasis in original.)

Lucht exchanged over 500 e-mails with KO on an almost daily basis over a six-month period. These e-mails neither met the definition of state business nor the criteria for acceptable personal use. They were unrelated to Lucht's assigned duties or employment. They were also neither incidental nor *de minimis*, and were primarily sent at times other than the lunch hour. Therefore, Lucht's e-mail communications with KO violated these policies.

Lucht argues that in the context of his "hostile work environment," he used his communications with KO to ease his work stress and, therefore, did not violate these policies. He asserts that he was justified in sending the e-mails because he was constantly attacked by other section managers, had no peers at PERS to turn to, was provided no support from Harrington, and relied on KO as a peer he could lean on. He explains, "[a]t the time of the emails this seemed like an appropriate way to continue functioning as an effective manager at PERS. Looking back still not sure if there were any options that would have been better."

We do not find Lucht's argument persuasive. Over 200 of the e-mails Lucht and KO exchanged address purely personal matters such as their relationships with other people, KO's taxes, family matters, Lucht's housing search, and their evening and weekend plans. In most of the e-mails in which Lucht and KO talked about Lucht's work, they also discussed purely personal matters. This high volume of personal e-mails is exactly the type of communication that these policies prohibit.

Lucht knew these policies placed significant restrictions on personal, non-state business related e-mail communications. He was trained on the policies and used these policies in disciplining a subordinate employee. The policies limit the type of allowable communications to an employee's assignment or employment. In spite of this, Lucht unilaterally decided that the policies did not apply to his communications with KO. Lucht's communications with KO were clearly unrelated to his assignment or employment, however. Therefore, even if Lucht's work stress may have been reduced by his communications with KO, any such reduction did not make those communications acceptable under these policies.

(2) Maintaining Professional Workplace Policy

Lucht also violated the Maintaining Professional Workplace policy. That policy provides that "[a]ll employees are expected to behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior." Inappropriate conduct under the policy includes making disparaging, demeaning, or disrespectful comments about other employees or managers. On July 19, Lucht e-mailed KO that Harrington had given him "a blank reaction, kind of like a deer in the headlights." When KO responded, "[t]his guy is not the brightest bulb is he? Kinda hard to communicate with someone

who can't think on their feet. It's like pulling teeth. No wonder things move so slow," Lucht's only response was "[t]hat's when things move at all." We conclude that by communicating with KO in this manner, Lucht not only treated Harrington in a disrespectful, non-professional manner, but encouraged KO to do the same.

(3) Conflict of Interest and Standards of Conduct Policy

Lucht violated the Conflict of Interest and Standards of Conduct policy. That policy prohibits "any action which might result in or reasonably be expected to create the appearance of: * * * giving preferential treatment to any person or entity, * * * losing complete independence or impartiality, * * * affecting adversely the confidence of the public and/or membership in the integrity of the fund and the state." PERS charged Lucht with losing impartiality and giving preferential treatment to a candidate in violation of this policy. PERS proved that Lucht acted as charged.

Lucht argues that much of the testimony of Harrington, Bamford, Duff, and Cunningham was too contradictory, inaccurate, and vague to be reliable. He points out that Harrington testified he met with Lucht on July 13 and even put this date on his meeting notes, although the meeting occurred on July 15. In addition, Lucht asserts that Harrington's notes of their July 12 meeting were incomplete because Harrington did not list all of the participants in KO's informal interview. Lucht claims Bamford is unreliable because she recalled that she met with Lucht on July 14, when the meeting occurred on July 9. Finally, he contends Cunningham and Duff are unreliable because they provided different descriptions of what occurred during the meeting after KO's informal interview.

Any inaccuracies in these witnesses' testimony are insufficient to make their entire testimony unreliable. While Harrington's notes and testimony regarding the timing of the meeting are inconsistent with the other evidence, his testimony about what occurred at the meeting was similar to Lucht's. Bamford's confusion over the exact date of a meeting which occurred six months prior to the hearing is insignificant, especially since her recollection of what occurred at the July 9 meeting is essentially supported by Lucht's testimony. Cunningham's and Duff's testimony was similar enough to be credible. Finally, even if these witnesses' testimony was not completely accurate, Lucht's and KO's e-mail communications alone are more than sufficient to prove that Lucht violated the conflict of interest policy.

We acknowledge that in regard to the recruitment for the job rotation/WOC position, Lucht did not initially violate any policies by focusing his efforts on hiring KO to fill that position. It is not disputed that he had the authority to recommend hiring someone for the temporary position without an open recruitment process. He had identified KO as someone with experience that might be a good match for PERS. He and Harrington had been unable to identify a good internal candidate and agreed that Lucht should arrange for KO to come in for the informal interview process.

However, after the temporary position was posted internally on July 1, Lucht was required to proceed with the WOC recruitment in an objective and impartial manner. Instead, he continued to communicate with KO as if she was going to be hired for the position, conveyed the impression he was merely going through the steps of the internal WOC hiring process, and inappropriately shared information with her about the process and other applicants. For example, on July 6, a time when employees were still applying for the WOC position, Lucht told KO “[w]hen you work for me there will not be any of this early morning slaking [sic] off.” Even worse, on July 7, when he sent KO the questions he was having the internal applicants answer, he told her “[i]f you could fill them out also it will give me a basis to show how much more qualified you are than the others.” Later that day, he told her that no one in whom he was interested had applied and joked that she did not have to apply to be interesting. Finally, on July 8, Lucht told KO that a number of the applicants failed to even meet the minimum qualifications.

Lucht also did not act objectively or impartially when he misrepresented the informal interview participants’ and Bamford’s opinion of KO in order to get Bamford’s and Harrington’s approval. Lucht’s statements to Bamford and Harrington that the interview participants liked KO and thought she would be a good fit and the best choice are neither consistent with his own testimony nor other evidence. The interview participants did not endorse KO, but at best indicated they felt there was no perfect solution. Lucht also failed to share any of the informal interview group’s concerns about KO with either Bamford or Harrington. In addition, Lucht’s statement to Harrington that Bamford had agreed KO was the best choice was clearly not true. Lucht himself later admitted that Bamford did not say this, but told him that the selection was his decision.

Lucht also violated the Conflict of Interest and Standards of Conduct policy by continuing to show KO preferential treatment during the hiring process for the permanent position. Lucht understood that there was a greater need to be objective and impartial during the permanent recruitment. In spite of this understanding, he inappropriately discussed and shared information with KO about the hiring process. For example, on July 8 and 9, he notified her about the posting for the permanent position and discussed his thought process on when the written questions would be added and how quickly he wanted the process to proceed. On July 12, when KO asked if she needed to do anything with her application, Lucht did not tell her he could not assist her with the process, but responded “I think it is really good, just answer the supplemental questions well.” On July 22 and 26, he volunteered his intent to begin work on the interview questions for the position. Later, when KO sent him interview questions that she had prepared, instead of telling her that her actions were inappropriate, Lucht responded with encouragement and joked about narrowing the field of applicants to just one. Lucht also told KO when he was getting the applicant list and when interviews were to be scheduled.

Lucht argues that he only provided KO information he would have provided any other applicant, if they had asked. Yet, the evidence shows that Lucht provided KO with updates on, and details about, both hiring processes on a daily basis. He also inappropriately disclosed information to her about the other candidates' qualifications and internal matters, such as when he was developing the interview questions and when he planned to contact candidates to schedule interviews. Furthermore, Lucht provided much of the information about the hiring process to KO in the course of their daily personal conversations. There is no evidence that he provided such information to, or interacted in this manner with, any of the other applicants.

To be clear, even if Lucht had not shared inappropriate information about the hiring process with KO, we would still have found a violation because the manner in which he conveyed the information shows preferential treatment. Instead of dealing with KO in an objective and arms-length manner, as is appropriate with an applicant for a job, he shared information with her about both the WOC and the permanent positions because of, and as part of, their personal communications arising out of their friendship. It is his treatment of her as a confidant during the process that allowed KO to feel it was acceptable to ask him to review her test question responses and application, and to even send him proposed interview questions. It is not credible that Lucht would have communicated with any of the applicants in such a familiar and preferential manner as he did with KO.

Lucht's apparent belief that his disclosure of his friendship with KO to Harrington, Korn, and Bamford alleviated his responsibility for his subsequent actions is not persuasive. For one thing, Lucht did not fully disclose the extent of his friendship with KO. He did not tell them that he and KO communicated on a daily basis about the intimate details of their lives, provided essential support for each other in their work and personal lives, and saw each other frequently after work and on weekends. In addition, the real issue is not that Lucht had a personal relationship with KO. The issue is, as the e-mail communications show, that his relationship with KO prevented him from treating her like any other applicant. Until his managers viewed Lucht's and KO's e-mail communications, they had no reason to know that Lucht's friendship with KO was causing him to behave in the manner he did.

PERS did not prove Lucht violated the Conflict of Interest and Standards of Conduct policy by holding a meeting with the interview panel to consider a second interview as part of the hiring process. Lucht acted appropriately by first consulting with HR to determine the circumstances under which a second interview was normally held. It is undisputed that a second interview was typically part of a recruitment process when the top two candidates' scores were close. Although it is Lucht's disproportionately high

scoring of KO which led to the need for the second interview, PERS did not charge that Lucht's high scoring violated the policy. The evidence shows that Lucht's request that the panel consider whether a second interview was necessary was consistent with PERS' recruitment practice.

(4) Lacked Good Judgment as a Hiring Manager

Lucht also failed to demonstrate good judgment as a hiring manager. His e-mail communications with KO reflect that they had the type of close relationship which would make it very difficult for him to remain impartial. Although his managers did not tell Lucht that being friends with KO was a problem in regard to the hiring process, Lucht, unlike his managers, knew the type of relationship he had with KO. Lucht should have known that his continued involvement in the hiring process in which KO was an applicant, and continued personal communications, would either affect his ability to be impartial or at least give the appearance that he was not impartial. A good manager would have recognized these difficulties and withdrawn from participation in the hiring process. Lucht's failure to recognize or take action to ensure that the hiring process was unbiased or appeared unbiased demonstrated bad judgment as a hiring manager.

Level of Discipline

PERS asserts that the three-week unpaid suspension is objectively reasonable in light of the severity of Lucht's conduct, the extensive nature of his inappropriate actions, his failure to take any responsibility for his actions or recognize that he had done anything wrong, his work history, and other comparable disciplinary action. Lucht argues that, at most, he should have received a reprimand, and PERS' consideration of comparable discipline was not appropriate because the employee at issue had violated multiple policies. For the reasons discussed below, we conclude that a three-week suspension was objectively reasonable and consistent with ORS 240.570(3).

Lucht's violation of the Conflict of Interest and Standards of Conduct policy and his failure to demonstrate good judgment as a hiring manager are alone sufficient to support the three-week unpaid suspension. His conduct was both severe and extensive. As a hiring manager, Lucht understood the critical importance of maintaining an objective, impartial hiring process. He was also aware of the close nature of his personal relationship with KO. Yet he failed to remove himself from a hiring process involving a close friend and, as a result, treated her preferentially and acted in a biased manner throughout the hiring process. We find especially disturbing Lucht's communications with KO which gives the impression that Lucht had no intention of considering other applicants for the WOC position, his misrepresentations of the views of the informal interview participants and Bamford, his daily communications with KO about the process for permanent recruitment, and his disproportionately high scoring of KO during the open recruitment.

A more severe discipline is also appropriate based on the explanations Lucht offered during the investigation of this matter, which were improbable at best. Lucht either clearly did not understand his own actions, or misrepresented them, when he said he had not given KO special treatment. While he may not have used the words "promise" or "guarantee," he not only led KO to believe he was going to hire her for the WOC position but acted as if she already had the job. In addition, neither his nor KO's e-mails support his assertion that he was joking when he called himself her boss and communicated as if KO was going to work for him. It is also not credible that his discussion with her about filling temporary positions was a hypothetical he was using so he could consider her response.

In addition to violating the Conflict of Interest Policy, Lucht violated three other policies. His complete disregard for the limitation on personal e-mails in the Acceptable Use of Information Systems and Personal Use of State Resources policies was highly inappropriate for someone in a supervisory position. This is especially true since he was exchanging personal e-mails with KO at the same time he was disciplining a subordinate employee for doing the same thing. As a supervisor, he also should serve as a role model to employees in establishing a respectful and professional workplace. Instead, he discussed his supervisor, co-workers, subordinates, and work in general with KO in an unprofessional and disrespectful manner.

Lucht's actions have substantially harmed the ability of other managers to trust and confide in him and significantly compromised his ability to act as an effective member of the management team. Lucht failed to fully disclose the extent of his friendship with KO to other management staff. He made misrepresentations to other managers in an attempt to secure their approval to hire KO. His disrespectful communications about his supervisor, co-workers, and his work in general also impact his effectiveness as part of the management team. His inability or unwillingness to recognize that his actions violated policies effects his credibility as a supervisor and role model for his subordinates. Finally, his e-mail communications, which are all public records, have a clear potential to negatively affect PERS' public image in regard to its hiring practices.

Lucht's disclosure to other managers of his friendship with KO does not mitigate his discipline. If Lucht had not been a manager, the fact that he disclosed this information would likely be persuasive. But as a manager, Lucht was responsible for ensuring an objective and impartial hiring process. In light of this responsibility, the other managers should have been able to expect that Lucht would recognize and be more forthcoming about such conflicts. In addition, if Lucht had legitimately sought to determine if a conflict of interest existed, he would have disclosed the true nature of his

relationship with KO, which he did not. It is true that these managers later developed concerns about Lucht's relationship with KO, especially after reviewing their e-mails. However, at that time, the interviews for the permanent hiring process were scheduled and the other managers were understandably reluctant to interfere with that process.

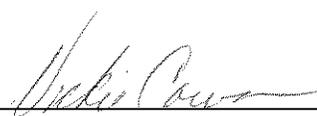
We recognize that Lucht has worked for PERS since 2003 without prior discipline. However, his preferential treatment of KO, the volume of non-business related e-mails, and the content of the e-mails reflect a gross disregard of PERS's policies. We are also disturbed by Lucht's lack of understanding of his obligations as a manager. During the investigation, PERS gave him multiple opportunities to respond to the charges against him. His refusal or inability to recognize that he did anything wrong makes it is unlikely that his conduct would be improved by progressive measures. Lucht violated four policies, which make his situation similar to the discipline situation PERS considered as a comparison.

ORDER

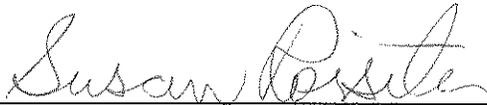
The appeal is dismissed.

DATED this 1 day of December 2011.

*Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson not available.