

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-17-10

(MANAGEMENT SERVICE REMOVAL)

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

On October 12, 2011, this Board heard oral argument on Appellant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, on August 10, 2011, following a hearing held on January 27 and 28, 2011, in Salem, Oregon. The hearing closed after the receipt of post-hearing briefs on February 28, 2011.

Larry L. Linder, Attorney at Law, Law Office of Larry L. Linder, LLC, Salem, Oregon, represented the Appellant.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On December 7, 2010, the State of Oregon, Department of Corrections (Department) removed Stephen Poage (Appellant) from his management service position as the Facilities Services' Administrator. Poage had no prior classified service. On December 21, 2010, Poage filed a timely appeal.

The issue is:

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

RULINGS

1. At the hearing, the Department objected to Exhibit A-74, an audio recording of an investigatory interview. The parties agreed that Appellant would substitute a partial transcript for the recording after the hearing, which he did. That transcript is received into the record as Exhibit A-74 in place of the audio recording.
2. The ALJ's other rulings were reviewed and are correct.

FINDING OF FACTS

1. The Department, an agency of the State of Oregon, operates 13 correctional institutions throughout the State. The Department's General Services Division provides centralized support services throughout the Department. The Division is organized into four units: Fiscal Services, Facilities Services, Distribution Services, and Information Technology Services.

2. The Facilities Services unit is responsible for carrying out policy development and technical responsibilities regarding the creation, planning, construction, remodeling, and maintenance of Department facilities. This unit is managed by the Facilities Services' Administrator, a management service position. This position's primary purpose is to direct

"day-to-day operational issues including planning, developing and implementing policy; budget development, monitoring and reporting; human resource management and determining the most effective utilization of the resources of the Unit. This position works with Institution Superintendents and individual maintenance and project teams to ensure consistency between Department Divisions and Units for the safe operation of the Department's prisons, buildings and property. This position is part of the General Services Management Team and must work closely with other General Service Administrators to provide excellent customer service to the department and leadership to staff."

3. The Administrator's position description lists guidelines that the person filling the position must follow; the list includes Oregon statutes and administrative rules; Department rules, policies, and procedures; Facilities Services' construction and deferred maintenance manuals; State procurement regulations; and Attorney General Model Public Contracting Rules, which are set out in two volumes, each of which is two to three inches thick. The description also states the position's major duties and the amount of time spent on those duties, including:

a. Forty percent: directing day-to-day operations, including recommending, developing, and implementing policy; assigning, supervising, and evaluating staff; ensuring maintenance and construction projects are consistent with Department policies, procedures, mission, vision, and values; tracking and control of projects; and maintaining a project team approach with staff, Department management, and stakeholders.

b. Fifteen percent: "[o]versee management of all projects at existing institutions related to deferred maintenance, capital improvements, code compliance, environmental compliance, and ADA compliance."

4. Fiscal Services, another General Services unit, provides Department-wide contract and purchasing services and expertise through its Purchasing and Contracts Section (Contracts Unit). The Contracts Unit employees are responsible for preparing and administering contracts and work with the Oregon Department of Justice (DOJ) to ensure a contract's compliance with state law.

5. Sometime prior to December 2007, the Facilities Services' Administrator position became vacant and the Department appointed Facilities Services' Business Manager Vernon Rowan as the interim Administrator.

6. In December 2007, Interim Administrator Rowan, Facilities Services' Construction Project Manager Paul Stanley, and Stephan Poage applied for the vacant Facilities Services' Administrator position. Poage had 25 years' experience in the private sector working with regional agencies and companies in the areas of facilities operations, infrastructure planning, design, and construction project management. Poage had acted as a senior project manager on renovations at the State Capitol and had been employed as the director of capital projects by two school districts.

7. The hiring panel for the Administrator position included General Services Assistant Director John Koreski and Fiscal Services Administrator Tamara Dohrman. During the hiring process, Koreski told Poage he was looking for someone to take an active role in training project managers, improving processes, and improving

communications. In February 2008, as part of the interview process, Poage outlined planned actions he would take during his first six months of employment regarding the issue of deferred maintenance to the institutions. Poage proposed to “[b]egin immediately to erase the credibility gap that is hindering the legislature’s funding of DM [deferred maintenance] projects. Establishing a new level of credibility may take 6 years, so I’ll start on that effort on the first day.”

8. Poage was hired as the Facilities Services’ Administrator, at the top salary step, and began his employment on March 3, 2008. Koreski told Dohrman, who had also recommended that Poage be hired, that he was bringing in Poage to fix procedures in Facilities Services. Koreski told Poage he had been hired because he was forward thinking, while Rowan, the other finalist, was more focused on maintaining the *status quo*. Poage understood that he had been hired to clean up problems with Facilities Services’ policies and procedures.

9. The Department never provided Poage with specific training on the State contract process or the duties of a contract administrator. Business Manager Rowan believes that there is inadequate training in the Department for individuals brought into Facilities Services from the private sector.

10. After Poage was hired, he evaluated the current Facilities Services’ processes and identified a lack of continuity in consultant selection procedures. In addition, Poage became concerned about the sufficiency of protocols for the anticipated increase in projects in the next several years.

11. On March 4, 2008, the Department sent out a Request For Proposals (RFP) 3763 for a design consultant to upgrade the electrical system at the Oregon State Penitentiary (OSP). RFP 3763 had been developed prior to Poage’s employment. On April 3, 2008, Poage attended the RFP 3763 pre-proposal conference as an observer. The primary Department representatives at the conference were Facilities Services’ Construction Project Manager Jimmie Poore, Electrical Manager Mark Ong, and Fiscal Services’ Contracts Specialist Kay Duffey. On April 7, 2008, Poage sent a memorandum to Poore, Duffey, and Duffey’s supervisor, Fiscal Services’ Purchasing/Contracts Manager Jan Lemke, outlining his concerns about the conference. He also asked to be kept informed about the RFP 3763 bid process, including the interviews and selection.

12. On May 14, 2008, Poage discovered that the RFP 3763 interviews were being held. Poage was concerned that he had not been kept informed about the process and neither he nor Rowan were involved in the interviews, even though this was the Facilities Services’ single biggest project. The next day, Poage asked Duffey to

temporarily suspend all outstanding solicitations, including RFP 3763. At the same time, Poage notified Koreski that based on his involvement in three projects, he found a lack of continuity in the consultant selection procedures and had suspended any outstanding solicitations. Poage also told Koreski that he intended to review the protocols for evaluating and selecting design consultants with the Facilities Services and Contracts Unit managers to make sure that sufficient checks and balances were in place. Poage sent copies of this e-mail to Duffey, Rowan, Poore, Ong, and Fiscal Services Administrator Dohrman.

13. Beginning on May 21, 2008, Poage held several meetings with Poore, Rowan, and Duffey regarding the selection process for consultants. Poage later held similar meetings during which the participants explored the best way to handle other General Services' processes. These "best practice" meetings were attended by staff from Facilities Services and the Contracts Unit. Fiscal Services Contract Specialist Scott Petterson attended one or two "best practices" meetings in which general contract processes were discussed.

14. On June 9, 2008, Poage sent Purchasing/Contracts Manager Lemke a memorandum outlining the following seven concerns about the RFP 3763 process: (1) the evaluation committee makeup did not follow the Department's norms and practices; (2) there was a lack of formal criteria for selecting firms to be interviewed; (3) a site visit had not been offered to all potential bidders, although one of the competing providers was already on site; (4) the RFP did not state the project was already funded; (5) the RFP instructed potential bidders to explore energy conservation incentives with a competing service provider; (6) the interview presentation, questions, and answer criteria were poorly prepared; and (7) the scoring methodology appeared unbalanced. Poage requested that Lemke cancel the RFP 3763 solicitation immediately and stated he would work with Duffey, Poore, and Ong to revise the RFP and create new interview criteria.

15. At a Facilities Services' staff meeting on June 19, 2008, Poage announced he was reorganizing the unit's staff and office space into project teams. Poage had previously received approval from Koreski for the reorganization, which he believed would enable the unit to be better prepared for the upcoming increase in capital improvement projects. Under the reorganization, the clerical employees, called project assistants, reported directly to the project managers.

16. Prior to the reorganization, Lead Project Assistant Carolyn Patton received a lead worker pay differential for her responsibilities over five project assistants. Rowan had submitted the original request for Patton's differential in November 2007. When

Poage discussed the reorganization with Rowan, Rowan told Poage that the change in Patton's duties might affect her pay. Poage was unaware that Patton had lead worker duties or that she was receiving the pay differential. He directed Rowan to look into the issue and do what was necessary since Rowan was Patton's supervisor. Poage never followed up with Rowan to determine whether Patton's pay had been affected.¹ At some point after the reorganization, Rowan told Patton that she would not lose her lead worker differential because of the length of time she had been working for the Department.

17. On August 13, 2008, Koreski, Poage, Purchasing/Contracts Manager Lemke, Rowan, and Julie Mills, Poage's project assistant, met to discuss contract routing. Previously, Koreski had told Poage that he was frustrated about the inconsistent routing process, had no information about who had seen a contract when it came to him, and felt he was being asked to sign documents that he did not always understand. The purpose of the meeting was to develop a paper trail to track who had reviewed a contract. The meeting participants discussed a contract review process and agreed to use a contract routing form presented at the meeting.

¹Poage and Rowan were the only witnesses to this conversation, which occurred in June 2008. Poage and Rowan were first questioned about the conversation in April 2010. Both had different recollections about what was said. Poage testified that when Rowan mentioned that the reorganization might affect Patton's pay, he told Rowan to deal with it since Rowan was her supervisor. Poage also testified that he did not tell Rowan there was no need to process the paperwork to remove the pay. Rowan testified that when he asked Poage if he should prepare the paperwork to remove Patton's pay differential, Poage told him that there was no need to do so because he was not planning on taking the money away from Patton based on her tenure. Rowan also testified that Poage told him that Patton was Rowan's cross to bear because she was assigned to him.

Here, both witnesses testified credibly. Poage's testimony that Rowan should take care of the issue was consistent with Rowan's role in initiating the differential as Patton's supervisor, and also consistent with Poage's statement that Patton was his cross to bear. Rowan's testimony that the wages would continue due to Patton's length of service was consistent with his later statement to Patton that the differential would be continued for this reason. In prior cases when we were faced with equally persuasive evidence, we ruled against the party who had the burden of proof. In this case, that is the Department. *See Nass v. State of Oregon, Employment Department*, Case No. MA-6-03 at 10 (Feb. 2004) (citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 667 (1977)).

18. On September 5, 2008, Mills notified Facilities Services' employees about the August 13 meeting, attached a copy of the contract routing form,² and provided a brief explanation of the agreed-upon process, stating:

"The attached form is a result of that meeting. The contract routing form is to be attached and travels with all contract documents, agreements, amendments, change orders, task orders, etc. The following is a brief explanation of how it will work:

1. Project Managers starts [*sic*] the process
2. Project Managers initiate contract preparation
3. The Project Team Manager, Business Manager and Administrator review and make recommendation
4. Facilities Services send [*sic*] to Consultant or Contractor
5. Contractor returns the contract to Facilities Services Administrator
6. Facilities Services administration obtains approval
7. Approver sends final documents to the Contract Unit."³

19. On September 15, 2008, Poage responded to a question from Construction Manager Poore about the routing process on a specific contract, stating

²Neither party introduced the attached routing form into evidence.

³The Department argues that Lemke never agreed to use the new routing process described in Mill's September 5 e-mail and points out that neither Lemke nor anyone else in Fiscal Services was sent this e-mail. Lemke admitted that she agreed to a process at the meeting, but she testified that, as the Designated Procurement Officer (DPO), she would not have agreed to give up control over the signature process as described in the September 5 e-mail. Poage, Rowan, and Mills testified that all participants at the August 13 meeting agreed to use the routing process described in the September 5 e-mail.

It is clear that the participants in the August 13 meeting all believed that they reached agreement on a routing process. Based on the recollections of Rowan and Mills, who were both credible witnesses, we conclude that Mill's September 5 e-mail reflects the Facilities Services' employees understanding of the parties' agreement at the meeting. Mills's failure to send the e-mail to Lemke or other Facilities Services' employees certainly added to the subsequent confusion and disagreements between Poage and Fiscal Services' employees. It does not, however, show that Lemke or other Fiscal Services employees were unaware of or disagreed with the process described in Mills's e-mail, or that Mills failed to inform Fiscal Services' employees about the meeting. Mills probably expected that Lemke would communicate the results of the meeting to the employees she supervised.

“[n]o, we are not revising the Routing Form at this time. This topic was one reason why Mr. Koreski and I asked for the meeting in the 1st place. Mr. Koreski is the only delegated signer of the contracts and change orders, and he will sign them following my recommendation when everything is in place.

1. The PM and Contracts Specialist finalize the contract preparation (I will email Contracts with approval to finalize) and,
2. Send it back to Facilities, and after Vern and my review Facilities will,
3. Forward it to the Consultant/Contractor for signature,
4. Contractor sends it back to Facilities and if all is in order,
5. I recommend and send it to Mr. Koreski for signature,
6. After Mr. Koreski executes the contract it returns to the Contract Specialist for the distribution of executed copies.

“These instructions (who it goes to next) are on the routing form.”

Poage sent a copy of his response to Project Manager Mike Clayton, Rowan, Mills, Koreski, and Contracts Specialist Duffey.

20. That day, Poore responded to Poage’s e-mail, stating

“I was not questioning who signs the contract or that your recommendation is required. I was questioning if the flow of the form matched the actual process. Contracts and Purchasing will need to change their process in sending out the PSC and Public Works contracts to have the form be correct.

“I don’t believe that all of their folks are aware of this change.

“Where does below item 1 show up on the form?”

21. On September 22, 2008, the RFP for the electrical upgrade at OSP was reissued with minor changes as RFP 3886. Poage worked with Contracts Specialist Duffey on the revision. At the request of the OSP physical plant director, Poage added a section allowing the Department to request mechanical engineering services for upcoming projects at Department facilities in the Salem area. RFP 3886 identified the estimated cost to complete the project as \$5.5 million. The separate project phases, which were included in RFP 3763, were also included in RFP 3886. RFP 3886 did not include language requiring amendments to be approved prior to each contract phase.

22. At some point, Poage became uncomfortable with the Facilities Services' practices of designing projects in-house, sometimes using inmate workers, and seeking an informal preliminary design and budget opinion from a contractor who would then be allowed to bid or work on the project. On September 26, 2008, he sent an e-mail to Koreski, with a copy to Administrator Dohrman, Lemke, Mills, and a DOJ attorney, proposing to use a licensed designer through a formal RFP process on all future public improvement and capital projects, unless the contracts specialist was provided with specific findings and rationale to justify a deviation from the process. He explained that a number of design and construction specialists expressed concerns about the current process; Poage was also aware that Contracts Unit staff had disagreed with some decisions made by Facilities Services' employees. Neither Koreski or Dohrman objected to Poage's proposal.

23. Koreski evaluated Poage for the period from March 3 through September 30, 2008. The evaluation addressed seven performance objectives, including developing a process for identifying, approving, and reporting deferred maintenance and capital improvement projects; developing the Facility Services' operations and deferred maintenance projects' budget; and creating improved construction project management methodologies. The evaluation referred to the best practices workshops Poage held with Facilities and Contracts Unit staff to discuss more efficient and accurate processes. Koreski acknowledged that because Poage had not previously worked in State government, he had "quite a lot to learn in a short period of time. Overall he has management [*sic*] well to get up to speed on the intricacies of state government, inter [*sic*] workings of DOC, and the high priority issues." In addition, Koreski complimented Poage on the changes he had implemented to improve internal processes and establish himself as a credible expert and lead representative with the Department of Administrative Services (DAS), Salem, the public, and the legislature. Koreski awarded Poage 16 hours of discretionary leave as recognition of his "excellent service" to the Department. This was the only evaluation Poage received during his time with the Department.

24. By memorandum dated November 19, 2008, Poage notified Lemke that since his last meeting with her and Duffey, "things have gone very smoothly with great communication and cooperation." He explained that the purpose of the meeting was to address the routing procedure and form for construction contracts, which still failed to include the changes that he and Koreski had sought regarding

"the what, where, why, who and how much. These items need to be explained briefly before I can make an informed recommendation to Mr. Koreski prior to his signing of construction contracts and change

orders. Most of these items need to be completed by Facilities Services personnel, however I need the support of Purchasing/Contracts since you basically own the contract processes and the forms and procedures related to them.”

Poage suggested that the specific information the Facilities Services’ project managers needed to provide be set out on a one-page routing slip accompanying the contract documents, and that those documents would then be initialed by the project manager’s supervisor and Business Manager Rowan, sent to the contractor to be signed, and reviewed and signed by Poage before they were forwarded to Koreski.

25. During November and December 2008, Lemke and Poage had several discussions about the contract routing process. Lemke was unwilling to agree to the process Poage proposed because she believed that the Contracts Unit should send the documents to the contractor for signature and control the signature process. Poage became very frustrated with the difficulty of trying to reach agreement on flow charts and routing slips and believed the Contracts Unit was not receptive to change. As a result, on January 9, 2009, Poage sent Lemke a memorandum regarding contract change order routing slips. Poage attached two options for routing flow charts, indicating that the first option was the flow chart discussed in a prior meeting with Lemke and Contract Specialists Petterson and Craig Hellman. The second option was a flow chart that had been developed in a work session with Facilities Services’ managers. Poage noted that “[t]he difference between the two options is when change orders are routed to Purchasing/Contracts (unsigned or signed).” Poage also stated:

“I reiterate that you ‘own the contract processes and the forms and procedures related to them’. Facilities Services is officially out of the business of creating routing forms and flow charts for contracts and change orders. The official documents of contracts and change orders are yours to pursue and develop.

“Items 1, 2, 3 in the middle of my 11/19/08 memo (what, who, where, why, how and how much) are still items that will need to be explained prior to my review and recommendation to Mr. Koreski for his execution of the documents. I’ll instruct the project managers to put those items into memo form and have the memo accompany the respective change orders.”

26. Rowan believed that Poage was unsuccessful in changing the contract routing process because the Contracts Unit would not follow the process Lemke agreed to at the August 13 meeting. Rowan interpreted Poage’s January 9 memorandum to

mean that Facilities Services would no longer be involved in writing contract flow charts and routing slips.

27. In January 2009, Dohrman replaced Koreski as the General Services Assistant Manager.

28. Sometime prior to February 6, 2009, Poage and Construction Project Manager Poore met with Dohrman and Human Resources (HR) Manager Benita Martin-Walls to discuss Project Manager Stanley's practice of splitting projects to fall under the bid requirement of \$5,000 and giving open work orders to preferred or recommended consultants and contractors. Poore was Stanley's direct supervisor. On February 6, 2009, after Poore told Poage he had not yet spoken with Stanley about the issues discussed at the meeting, Poage reminded him that the Department had an obligation to use, and to work with the institutions to use, the public contracting processes.

29. The bid for RFP 3886, the OSP electrical upgrade, was granted to MW Consulting Engineers (MW Engineers). Contracts Specialist Duffey drafted the contract with Poage's input. Exhibit A, Section A.2, attached to the contract draft, defined the six phases of the electrical upgrade design and provided an option for the consultant to design specified mechanical upgrades at OSP or other sites in the Salem area. After the contract was prepared, Duffey forwarded it to DOJ for its review, which took approximately eight weeks. DOJ modified the contract, including adding a requirement that an amendment be entered into and approved by DOJ prior to the authorization of Phases 2 through 6.

30. The final contract for the work under RFP 3886 (OSP Contract) consisted of a two-page standard professional services contract and 19 pages of attachments and exhibits. The professional services contract, which included the signature page, provided in part:

“The Services are more specifically described in the **EXHIBIT A, Statement of Work, attached to this Contract. The Owner agrees to pay Consultant for performance of the Services, a sum not to exceed \$130,000 for Phase 1 of the Project; a sum not to exceed \$ to be negotiated for subsequent Phases 2 through 6; and a sum not to exceed \$ to be negotiated for optional mechanical engineering Services. These sums shall include all allowable expenses. Consultant progress payments shall be made in accordance with **EXHIBIT B, Consultant Compensation**.”**

31. Exhibit B, Consultant Compensation provided, in part:

“B.1 BASIS OF COMPENSATION

“B.1.1 Phase 1: The Owner shall compensate the Consultant for the performance of Phase 1 Services set forth in the Statement of Work, as defined in Exhibit A, as follows:

“A sum not to exceed \$130,000 for Phase 1 Work completed and accepted by Owner, which includes Reimbursable Expenses of \$15,000.

“B.1.2 Phases 2 through 6: Upon completion and acceptance by Owner of Phase 1 Services, the Parties shall finalize the Cost of the Work for the remaining Phases 2 through 6 and shall negotiate the compensation for acceptable completion of this portion of the Services. The Parties shall enter into an amendment or amendments documenting the negotiated Services and compensation. No Phase 2 through 6 Services shall commence, and no payment will be made, prior to execution of such amendment.”

32. On April 29, 2009, Poage signed the OSP Contract on the line stating “Reviewed and Recommended for Signature.” Poage did not read the contract’s exhibits or attachments prior to signing the contract. Poage told Duffey that he saw no reason to review the contract because he was sure that the DOJ attorney knew more about writing a contract than he did. Dohrman also signed the OSP Contract that day.

33. The OSP Contract designated Construction Project Manager Scott Graves as the project manager and Poage as the contract administrator. Aside from dealing with emergencies, Poage had no previous direct involvement in Department projects and had never served as a contract administrator. Poage had also not asked to be designated the contract administrator.⁴ Poage understood that, due to the size and type of contract, his

⁴While Duffey testified that she would not have designated Poage as the contract administrator unless he had requested this, she did not clearly recollect such a request. Poage testified that he had not asked for this designation and the Department offered no proof that Poage had made such a request. We find that Duffey likely assumed that Poage would act as the contract administrator, and designated him as such, because she knew he was responsible for negotiating the subsequent phases of the contract.

role was to negotiate the fees and scope of the design for Phases 2 through 6. After these negotiations were completed, project management duties would be turned over to Graves. Poage did not believe that he had any responsibility for overseeing the compensation portions of the contract; he understood that compensation would be handled by Graves and Business Manager Rowan, who dealt with the payment of invoices for contract work.

34. Sometime prior to August 2009, Poore prepared an evaluation of Stanley that rated Stanley as exceeding expectations in all categories. Poage did not believe the evaluation was appropriate in light of Stanley's prior performance problems. Poage requested that either Dohrman or Martin-Walls meet with him and Poore regarding the evaluation. On August 20, Poage sent Dohrman an e-mail stating that he was confused by her voice message telling him to address the issue directly with Poore. Poage told Dohrman that the last time he had tried to do this, Poore had gone around him and appealed to her. Poage said that because he expected that Poore would do this again, he wanted Martin-Walls's involvement.

35. On August 25, 2009, Dohrman responded to Poage. She said that although she had told Poage to deal directly with Poore, she had also volunteered herself or Martin-Walls to accompany Poage to the meeting. She told Poage that he needed to change his relationship with Poore.

36. On September 8, 2009, Dohrman sent Martin-Walls an e-mail to "document a phone conversation" she had with Poage that morning regarding due dates on information he had failed to provide her on some budget issues. Dohrman did this because she was concerned Poage was not taking her request seriously, but at the time did not expect anything further to result from documenting the conversation.

37. By letter dated October 9, 2009, MW Engineers notified Poage that it had completed Phase 1 of the OSP Contract and provided a revised proposal outlining the scope of work and fees for Phases 2 through 6. Poage had reviewed the status of the project with the OSP representatives, Facilities Services' staff, and Contracts Unit staff while the Phase 1 work was being done. No one notified Poage that a contract amendment would be needed to authorize the Phase 2 work.

38. Emergency declarations are used by Facilities Services to respond to emergencies. After Poage became Administrator, he was required to respond to a number of emergencies. In such cases, Poage generally discussed the emergency with Department Director Williams and then gave Williams the declaration for his approval. Rowan drafted the emergency declarations for Facilities Services; if Rowan was unavailable, the

emergency declaration was drafted by whomever was available at the time the emergency occurred. Emergency declarations had to be approved by Department Director Williams or Deputy Director Mitch Morrow. Lemke was also authorized to sign emergency declaration amendments. Once an emergency declaration was signed, Facilities Services' employees were authorized to bring in designers and contractors to provide immediate services without having to go through a bid process or having a contract in place.⁵ After the work on the emergency began, Facilities Services' employees then worked with the Contracts Unit to draft the necessary contract, change order, or amendment to cover the work.

39. On October 13, 2009, Poage was notified about an emergency situation at Two Rivers Correctional Institution (TRCI). In the process of installing a new generator at TRCI, an electrical arc flash and explosion had occurred within the Automatic Transfer Switch cabinet. Poage discussed the emergency situation with Director Williams. Williams directed Poage to contact Budget Administrator Nathan Allen to arrange for the necessary funds and authorized his assistant director, Ginger Martin, to sign the emergency declaration on his behalf. Since Rowan was on vacation, Poage drafted the emergency declaration (TRCI Emergency Declaration).

40. The TRCI Emergency Declaration provided that Facilities Services was to "locate and immediately dispatch an engineer and contractor qualified to perform the required work." It also stated that the emergency "necessitate[d] immediate execution of contracts with qualified engineers and contractors to investigate the electrical damage at Two Rivers Correctional Institution," and gave Poage the "authority to negotiate contracts for the referenced project work." Budget Administrator Allen subsequently notified Rowan which cost center to use for the emergency.

41. After the TRCI Emergency Declaration was signed, Poage assigned Electrical Supervisor Ong as the on-site project manager. Ong oversaw the initial phase of the emergency work at the institution and consulted with Poage about the situation on a daily basis. Ong recommended that Christenson Electric be used as the emergency

⁵Petterson testified that Contracts Unit Manager Lemke usually had to agree that it was a true emergency before the emergency process was started and a contract would be in place before the contractor started work on the emergency. We find credible Rowan's and Poage's testimony that Rowan generally drafted the emergency declarations and that contracts were usually developed after the emergency response. Rowan was familiar with the appropriate process because he had been involved in numerous emergencies as interim Administrator and Business Manager. In addition, in December 2009, Lemke provided Rowan with an emergency declaration template for his use.

contractor because they were already working at TRCI under the Go Oregon Project, a solar installation contract. Ong understood that Christenson Electric would begin by taking temporary measures to make the current gear operate safely (Phase 1), and then install new switch gear (Phase 2). Poage also arranged with MW Engineers to investigate the cause of the emergency and design the new switch gear. Poage believed it was important to select contractors already under contract with the Department to ensure that bonding and insurance coverage existed during the emergency work until a new contract could be negotiated.

42. When Poage contacted Christenson Electric, a representative told him a written authorization was required before the company could proceed with the emergency work. As a result, Poage prepared a change order to Christenson Electric's Go Oregon Contract. The change order stated it "would serve as a bridging document to bind the parties (ODOC and Christenson Electric) for this emergency response while a separate contract is in preparation. All terms, bonding, insurance and other general provisions of your current contract will remain in force during the interim period." The change order was signed by a Christenson Electric representative on October 18 and by Poage on October 23.

43. On October 20, 2009, Contracts Specialist Duffey e-mailed Facilities Services' employees an attachment entitled "Process for Contracts/Amendments Guide." Although the guide had existed for several years, it had not previously been provided to Poage. Duffey stated that the guide was to remind staff of the steps the Contracts Unit followed when processing Facilities Services' contract documents and addressed "the process from my perspective; not to any other requirements internal to Facility Services, and is somewhat simplified." Duffey did not consult with or seek feedback from anyone in Facilities Services before sending out this guide and was aware that some of Facilities Services' processes had changed since the guide was originally developed.

44. Under Duffey's attached guide, the contract process proceeded as follows: (1) the requestor prepared and submitted a request form for the contract or amendment to the budget office; (2) the budget office approved and forwarded the form to the Contracts Unit; (3) the contracts officer, working with the requestor, drafted the contract or amendment; (4) once the draft was finalized, the contracts officer forwarded the document to the requestor for initial approval; (5) the requestor forwarded the final draft to Poage for approval; (6) the contracts officer inserted Poage's approval into the final draft and forwarded it to DOJ for approval, if needed; (7) the document was sent to the consultant for signature; (8) the consultant signed and returned the document to the contracts officer; (9) the document was forwarded for other Department signatures; (10) once signed, the contract officer issued the Notice to Proceed; (11) the work could

not begin without a Notice to Proceed or continue past the expiration date; and (12) the requestor monitored contract performance and, if required, requested an amendment for an extension or change following the same process.

45. Poage received Duffey's e-mail but did not review the attached guide because he received numerous e-mails, he was busy dealing with the TRCI emergency, and Duffey neither flagged the e-mail as important nor identified a specific project in the subject line; the e-mail stated that the attachment was Duffey's perspective on the process and did not apply to internal Facilities Services' processes. Around this time, Poage was also dealing with his own health issues and the death of his brother.

46. By letter dated October 29, 2009, Poage sent MW Engineers a letter authorizing it to proceed with Phase 2 of the OSP Contract for the sum of \$170,000. The letter also showed that the amount which had been authorized for Phase 1 was \$136,000, which was incorrect. Poage did not seek a contract amendment prior to authorizing the work, consult with anyone prior to authorizing the work, or send a copy of his authorization letter to anyone in the Department.

47. On November 16, 2009, Poage sent a memorandum to Lemke regarding the TRCI emergency. Poage provided a lengthy description of the work to be performed and attached the related e-mail communications, TRCI Emergency Declaration, and Christenson Electric change order. Poage notified Lemke that

"[a] separate contract needs to be issued to Christenson for the completion of Phase 1 of the emergency response (damage repair and installation of temporary equipment and ordering, purchasing, shipping the permanent equipment to be installed at TRCI) and for the Phase 2 reconstruction. Phase 2 will be the shutdown, installation of new equipment, and cut-over and performance testing.

"* * * * *

"Note: Owner has retained an electrical engineer (Bob Welt of MW Consultants) to review all applications, calculate loads and monitor the installation of the new equipment. Mr. Welt is a professional resource to the contractor and the institution, and will communicate his findings and recommendations in conjunction with Mr. Ong. Mr. Ong remains the Owner's primary point of contact and the designated spokesperson for the Owner in the context of this emergency response action."

48. On November 20, 2009, Lemke sent an e-mail to Poage in which she stated that she had been informed that the work under the TRCI Emergency Declaration had been inadvertently added to the Go Oregon Project and that the emergency declaration needed to be paid under a separate contract. Poage immediately responded that he had only used the change order on the Go Oregon Project as a bridging document for the contractor's initial response until a new contract was written and there was no intent to pay for the emergency work out of the Go Oregon funds. Lemke replied "[e]xcellent. I got a bit spun up (I am sure, this is a shocker to you) when I saw the documents. My goal is to have the Go Oregon documents as clean and audit friendly as possible."

49. By letter dated December 11, 2009, Poage authorized MW Engineers to proceed with Phase 3 of the OSP Contract for the sum of \$300,000. The letter again incorrectly stated that \$136,000 had been authorized for Phase 1. Poage did not seek an amendment or consult with anyone prior to authorizing Phase 3 of the work or send a copy of his authorization letter to anyone.

50. On December 14, 2009, Lemke sent Rowan a revised emergency declaration template, which she asked him to use in the future. Rowan used the new template in drafting an emergency declaration that he prepared for Poage's review on January 13, 2010. He also notified Poage that the form had been revised.

51. Business Manager Rowan is responsible for the payment of work invoices. The Department uses an automated contract tracking system for payment of any contracts or work, called AFAMIS. When Rowan receives an invoice or request for payment, he determines that sufficient funds are identified as available in AFAMIS before he pays the request.

52. The usual process for drafting a contract amendment was for a Facilities Services' project manager to provide the technical information and describe the nature of the work that the consultant would perform. The project manager then submitted this information on a contract request form with the other required information to the Contracts Unit to draft the amendment. It took from seven to fifteen days for the Contracts Unit to prepare a simple contract amendment.

53. Sometime prior to January 14, 2010, MW Engineers sent invoices for its TRCI Emergency Declaration work to the Department. Poage then realized that no contract had been prepared to cover the payment of those services. He asked his assistant Mills and Project Manager Graves to determine how long it would take the Contracts Unit to prepare an amendment, but they were unable to provide him a clear

answer.⁶ Without consulting with the Contracts Unit, he then directed Mills to use the language from another professional services contract amendment to draft an amendment to the OSP Contract to cover the MW Engineers' emergency work at TRCI (TRCI Amendment). Poage decided to prepare the amendment himself to enable MW Engineers to be paid as quickly as possible. MW Engineers signed the TRCI Amendment on January 14, 2010.

54. On January 18, 2010, Poage signed the TRCI Amendment and submitted it to Dohrman with a recommendation for her signature. In the note accompanying the amendment, Poage explained that

“[a]ttached are three (3) originals of an amendment to MW Engineers (Mech/Elect) contract. The amendment is for the emergency declaration response to TRCI's auto transfer switch explosion. We used MW Engineers because they were already contracted to DOC (OSP Electrical) and their ability to respond on the day of the accident.”

Based on Poage's recommendation, Dohrman signed the amendment on January 20, 2010.

55. Sometime prior to January 21, 2010, after Poage and Rowan discussed the status of payments to MW Engineers and Christenson Electric, Rowan contacted Contracts Specialist Petterson about the payment of the invoices for the emergency work at TRCI. On January 21, 2010, Petterson sent an e-mail to Rowan explaining that he had talked with Lemke and could not issue a contract for Christenson Electric's emergency response because of Lemke's concerns. Lemke was concerned that (1) the Christenson Electric change order for Phase 1 of the emergency work had been signed by the contractor and Poage in October, but had never been signed by Dohrman, who was required to approve such change orders; (2) the Christenson Electric change order for Phase 2 of the emergency work was unsigned; (3) the TRCI Emergency Declaration had been signed by Martin, who did not have authority to do so; and (4) the Phase 2 work could not be completed under the original TRCI Emergency Declaration because it had expired. Petterson believed what had occurred at TRCI did not warrant an emergency declaration, and that emergency declarations were being used by Facilities Services in non-emergency situations.

⁶This information was provided by Poage in his April 1, 2010 investigation interview. There is no evidence that Mills or Graves spoke with the Contracts Unit about needing an amendment for MW Engineers' emergency work.

56. On January 26, 2010, Lemke sent Poage an e-mail regarding the TRCI Amendment, stating:

“This is a follow up to my voice message of late last week. It appears that someone in the Facilities Office drafted and processed Amendment #1. The authority to draft and generate contracts and amendments resides in the Purchasing/Contracts Unit under the DPO authority. No other section is authorized to enter into contracts. To ensure that this amendment is fully executed and available for payment, I need to have the contract amendment form filled out and sent to Budget for approval. Kay [Duffey] will include this in the appropriate contract file. I am holding the amendment at my desk pending the approved amendment request.

“DOC could end up in a position that is not legally defensible if this occurs again.”

57. On January 29, 2010, Poage responded to Lemke explaining the events related to the emergency work and admitted that it was only after MW Engineers had sent an invoice that he realized there was no contract under which the invoice could be paid. Poage explained that he then directed Mills to use a standard form to draft the amendment so it could be processed quickly, and had not known that this would be an issue since the amendment would go to the Contracts Unit after the engineer had signed it. Poage explained:

“The procedural side of the emergency response appears okay. The Director declared the emergency response and authorized me to negotiate the contracts and bind the agency contractually. He also authorized Nathan (Allen) to sort out the best method to fund the response, so I don’t see any potential legal exposure, or future audit issues if they should arise. We can certainly discuss this further as needed.

“The internal communications side of this could certainly be improved, and I’ll take responsibility for that. It is seldom perfect in emergency situations. Much like this example, we usually end up putting out the fires and then cleaning up this stuff after the fact.”

58. In early February 2010, Poage asked to meet with Rowan about MW Engineers’ invoices for Phase 2 and 3 of the OSP Contract. Prior to the meeting, Rowan contacted the Contracts Unit to determine whether the information necessary to make payment had been received, but not yet entered into AFAMIS. Rowan had not read the

OSP Contract and was not aware that an amendment was required before the Phase 2 through 6 work could be authorized. The Contracts Unit told Rowan it did not have the paperwork to enter authorization for payment and that an amendment needed to be negotiated and approved by DOJ prior to authorization of additional phases under the contract. Rowan conveyed this information to Poage.

59. On February 5, 2010, Poage sent a memorandum to Rowan, with a copy to Lemke, explaining that since the contract was for one consultant, he was unsure of DOJ's intent in requiring amendments for Phases 2 through 6. He stated "I don't think the intent was to select from one firm to do the design, sign a contract with them and then have both parties sign 5 or 6 more times (their principal and our Director) for each phase of the same design." Poage asked Rowan to clarify the intent so that payment could be made to the consultant and provided Rowan with a copy of the OSP Contract and his Phase 2 and 3 authorization letters.

60. On February 8, 2010, after Mills sent Lemke a memorandum and Poage's letters authorizing MW Engineers to proceed on Phase 2 and Phase 3 of the OSP Contract, Poage and Lemke exchanged the following e-mails:

a. Lemke e-mailed Poage that there was a serious problem because the OSP Contract required that an amendment be executed before MW Engineers could be authorized to proceed with Phase 2 through 6. She explained that to "clean up what has happened and to make DOC legal" an amendment request had to be submitted for Phase 2 and 3 and the request had to be approved by the budget office. The request would then be handled expeditiously by the Contracts Office. In addition, before the amendment could be signed, DOJ needed to review it for legal sufficiency due to the dollar value of the work. Lemke also reminded Poage who was authorized to sign contracts.

b. That afternoon, Poage replied to Lemke that:

"I had not understood that the 'to be negotiated and amended' would not be done by me as the designated Contract Administrator, with input from the project manager. After all, it is a fully funded contract which has already been signed. You may want to clarify who signed it initially, because it was over \$100K.

"Please clarify for me the 'negotiated and amendment' part of this. Did DOJ actually set this up so that they would review and authorize amendments to be signed by Max between the: 1.) Evaluation of existing

systems and design development, and again between 2.) Schematic design and design development, and again between 3.) Design development and preparation of construction documents, etc. for two to six phases of the engineer's work? I knew that after the 6-8 weeks delay that it had gotten complicated, but not bizarre.

"I was told for the first time late last week that we have eleven (11) unpaid invoices totaling over \$300,000 from MW Engineers for the OSP upgrade and the OSCI emergency response. Your email last week told me that we have around \$20,000 to pay them with (evidently because my written authorizations to proceed with each next phase apparently didn't count and/or didn't get into the correct hands, entered/transferred, etc.)"

c. A few minutes later, Poage sent another e-mail to Lemke in which he asked why companies kept working with the Department, and stated that neither he nor MW Engineers had understood each phase would need to be reviewed by DOJ and signed by Williams.

d. Later that afternoon, Lemke responded to Poage's first e-mail:

"The contract clearly states that any amendment to the contract MUST be properly amended and that means going through the proper channels (request, Budget, Kay, DOJ at \$150K now and then the appropriate signature trail ~ Tami, Max or Mitch). Amendments to any and all contracts, no matter what type they are, must have the proper amendment process completed (with or without DOJ depending on the value). This is not new but the way the statutes and rules are written to avoid scope creep on contracts.

"When we last talked about the contract, I did not realize that phase 2 and 3 had been agreed to and work performed. There was no way I could have known because the proper documentation had not occurred. You as the contract administrator can and should work with the contractor to decide if any change has occurred to the original scope of work and then the price that will be charged for the additional phases. After the negotiations, the amendment request starts the completion of the contract amendment."

e. A few minutes later Lemke responded to Poage's second e-mail that, due to the economy, she could understand why vendors worked with the Department; that vendor payments are not held up if appropriate processes are followed, but are held up,

as in this case, when appropriate processes are not followed; and that Dohrman could have signed the amendment, but Poage was not authorized to do so.

61. Also on February 8, 2010, Lemke and Dohrman exchanged the following e-mails regarding Poage's authorization of Phases 2 and 3 of the OSP Contract without an amendment:

a. After Lemke copied Dohrman with her original e-mail to Poage, Dohrman replied asking "[i]s this another one or the same one?"⁷ Lemke responded to Dohrman that

"[t]his is a new one and I am very HOT! Stephen is putting the department in harms [*sic*] way. I have told him in person and have emailed numerous times that he has NO signature authority and to NOT sign or generate documents from his office. This could have been very messy and may still be. If we are audited on this contract, they will see that Stephen is out doing things that are in direct conflict with the contract let alone that he has not [*sic*] authority.

"I am sorry but this is twice in a couple weeks that he has gone rogue on me with contract."

b. Dohrman responded by asking if Lemke was ready for her and HR Manager Martin-Walls to step in.

c. Lemke replied:

"I believe it is time to have someone talk with Stephen about what he can and cannot do and sign. My talks and emails are not getting through and I cannot say what other incidents are just waiting to be found. Per statute, Stephen could be personally liable for these two incidents (included on attachment). The contract clearly states that an amendment must be in place before any work can be done.

"I am extremely frustrated as are Kay [Duffey] and Scott [Petterson]. It is more work to clean up the messes and we look like fools (not the

⁷Based on the sequence of events, we assume that "the same one" in Dohrman's e-mail refers to the contract issues related to the TRCI emergency work.

professional procurement staff that we really are[)]. Attached is a summary from Kay of what occurred and what DOC must do to 'fix' the issue."

62. On February 9, 2010, Poage sent an e-mail to Lemke in which he explained that he had not signed a contract, but believed he was negotiating the next phase of a fully-funded project. Poage also noted that neither he nor the contractor realized that review by DOJ and a new contract was required for each design phase, but that he had reviewed the OSP Contract and could now see that each phase was really a series of mini-contracts. Lemke responded to Poage that his letters to MW Engineers authorizing the additional phases constituted unofficial amendments, that she agreed each phase was a stand alone mini-contract, and that these contracts would need to be ratified before payment could be made. In addition, the Department needed to provide DOJ an explanation of why performance had begun before DOJ approved the contract, a description of steps to avoid similar circumstances, and a proposed ratification document.

63. Poage had no previous experience with contracts that required an amendment between different phases of work. In Rowan's experience, less than five percent of Facilities Services' contracts, usually only the larger ones, required amendments between contract phases.

64. On February 17, 2010, Duffey sought DOJ Attorney Peter Dassow's advice about whether a ratification of amendments was necessary to secure payment for the work Poage had authorized on Phase 2 and 3 of the OSP Contract. Dassow advised Duffey that the Contracts Unit would need to create an amendment to explain what Poage's Phase 2 and 3 authorization letters and the TRCI Amendment purported to accomplish because (1) the authorization letters included an insufficient description of the services, an unclear basis for payment, and are likely unenforceable; (2) the amount of the payment identified in those letters for the Phase 1 service was incorrect; and (3) the TRCI Amendment was outside of the scope of service in the OSP Contract.

65. On February 22, 2010, after talking with Dohrman, Lemke notified Director Williams that he would need to sign a ratification document regarding work which had been done under the OSP Contract without an amendment. She explained that although the contract was designed so that each phase required an amendment, "the contract administrator wrote their own letters to proceed without involving the contracts unit, no legal sufficiency review was conducted and the proper signature authorization was not received." She further stated that a problem existed because, although the OSP Contract applied to work in the greater Salem area, the contract administrator wrote the

TRCI Amendment to cover work in Umatilla. Lemke also provided Williams with Dassow's list of concerns.

66. After Williams asked Lemke or Dohrman to explain how the situation with the OSP Contract went wrong, Lemke responded:

“Stephen Poage is the contract administrator on this contract and has taken a straight forward contract that is no different from the majority of them and has turned it into a royal mess (frankness asked for). He has not followed the clear directions given in the contract on how to proceed with managing said contract. The contract language was blatantly disregarded. The reasoning I have been given (not by Mr. Poage but others) is that he thought this was a work order contract and as such did not have to have the contract amended with the statement of work etc and could do all this under his own signature authority. Personally, I think this is a weak excuse for not reading the 8 pertinent pages of the contract to understand how to proceed and administer the contract. If there was ever a question on the intent, he could have contact [*sic*] the contract officer or me. He was quick to scan and send me those 8 pages when he wanted Vern Rowan (see attached) to ‘fix’ the issue and make sure the monies were put on AFAMIS to pay the contractor. Needless to say, Vern could not just fix the contract and add the money. This is when I first became aware of the mess that had been created.

“Mr. Poage requested that the additional language for the mechanical engineer in the greater Salem area be added as an option and then he forgets what he asked for and directs a [*sic*] work to be done at TRCI for electrical engineering. We cannot operate this way. It is not open and fair to anyone. This part of the contract will be removed and fixed outside the OSP contract.

“My hope is that other contracts are not being managed in a similar manner. It took a few months for this to come to my attention and the contracts unit will get it cleaned up. This is unacceptable behavior and has created extra work for staff and myself, let alone involving you in contract ratification.”

67. On February 22, 2010, Duffey asked Poage to provide her with specified documents for her use in drafting the Phase 2 and 3 amendments for the OSP Contract.

68. On February 22, 2010, Ong sent an e-mail to Poage in which he explained that Petterson told Christenson Electric that he did not believe that installing the new switchgear was an emergency. Ong asked Poage if he could authorize ordering the switchgear. Poage responded to Ong that "I don't have authority to authorize anything." After Ong asked what to do next, Poage replied that the Contracts Unit was not going to honor his prior authorizations to MW Engineers and Christenson Electric regarding the permanent replacement of the switchgear because "[a]lthough I maintain that it was the right thing to do, the specific language of the Emergency Declaration doesn't stretch that far. It was basically for assessing the situation and stabilizing the site. It doesn't address the permanent fix." Poage then explained that his first concern was writing an amendment for MW Engineers and a second change order for Christenson to get them paid for the initial phase of the emergency they had already done. Regarding the installation of the new switch gear, he told Ong that they were authorized to pay for it and recommended that he contact the Contracts Unit on the steps necessary to procure the new switchgear.

69. On March 4, 2010, Poage sent an e-mail to Lemke, which he copied to Duffey and Dohrman, regarding concerns he had about the interview scoring on a selection process. Poage asked that the notice of award not be issued so he could review the scoring design; he also asked that a Contracts Unit manager assist him. On March 8, Lemke responded that she and Duffey would like to meet with him about his e-mail. Poage later responded that he had no further questions about the selection recommendation and Duffey could proceed with the notice of award.

70. After receiving Poage's response, Dohrman e-mailed Lemke, with a copy to HR Manager Martin-Walls, asking "I wonder what changed his mind?" Lemke responded to Dohrman and Martin-Walls that "I am thinking he realizes that this is one he cannot win and is letting it go. He really does have bigger fish to fry and I think he is finally realizing it." Dohrman responded to Lemke and Martin-Walls "I still think we need to keep this on our list of issues!" Lemke responded "I agree. He was attempting to influence me (and maybe Kay) into thinking that the process as [*sic*] flawed when it was a valid interview process. With my authority as DPO, I could easily have said the interview was flawed and insisted that it be redone or changed."

71. On March 8, 2010, Poage hand delivered the documents that Duffey had requested to her office.

72. On March 9, 2010, Lemke and Dohrman sent Poage separate e-mails asking why he had not provided the documents Duffey had requested. Dohrman stated "this is very important and not following up on this puts DOC in a risky situation." The

next morning, Poage e-mailed Dohrman that he had confirmed that the information had been hand delivered to Duffey on March 8. Dohrman responded by asking “[w]hen she sent an e-mail, why did you send it back hand delivered? Why did you just not respond to her?” Poage responded that he was not sure what she was asking, but that he had provided the requested documents, some of which were engineer originals that he did not have in an electronic format. Dohrman responded that

“Kay sent the e-mail on February 22. It would have been appropriate for such a hot topic, to send Kay at least an e-mail that it was coming hand delivered and when to expect it. It took almost 2 weeks to get her the information.

“People have a hard time keeping up with how and when they are going to receive information. My question isn’t just related to this issue but overall, you respond to people in many different ways – sometimes it is hand delivered, sometimes e-mail, sometimes it is from you and sometimes you have Julie scan a memo in and send it.”

73. On March 9, 2010, Dohrman requested that Director Williams and Assistant Director Morrow not sign any Facilities Services’ emergency declarations without first contacting her or Lemke; if they could not be reached, she asked that Williams provide them with a copy of the signed declaration. She stated further that she, Martin-Walls, and Lemke were going to meet with the Department’s Special Investigations Unit (SIU) about “doing an investigation about whether Facilities is circumventing the purchasing laws by using emergency declarations and also circumventing other contracting statutes.”

74. Also on March 9, Ong notified Poage that Christenson Electric’s contract and payment for the emergency work had been completed. Ong also recommended, based on his conversation with Duffey, that the MW Engineers’ TRCI Amendment be cancelled; that the Department enter into two contracts with MW Engineers, one to cover Phase I of the TRCI emergency work and the second to cover the new switchgear design under Phase 2; and that the installation of the switchgear be put out for bid.

75. On March 10, 2010, Poage responded:

“If I understand you correctly you are recommending direct placing 2 contracts to MW Engineers for work that they have already done?”

“It looks like we should discuss this further. Both MW and Christenson have formally proposed work, which was accepted by the DOC Contract Administrator, proceeded with DOC authorization (which was later revoked by DOC Contracts) and performed the services that were proposed and accepted. If we cancel the previous authorizations and amendments (which just might be legal in a court of law) and subsequent design and/or installation problems occur with that work, can we hold those companies or their insurers accountable for the failures and problems?”

“There may be a faster way to issue the direct contracts (rather than amend the ones in place), however my choice to use the contracts in place was to assure that DOC was protected by the insurance and bonding of their existing contracts. It looks to me that if something goes wrong prior to the completion of Phase 2 that DOC may still be at great risk. Please advise your thoughts.”

76. On March 11, 2010, Poage responded to Duffey regarding questions related to the drafting of the ratification document for Phase 2 and 3 of the OSP Contract. As part of his response, Poage suggested that it was probable that DOJ put the reference to the State Energy Efficient Design (SEED) and solar requirements in the contract because DOJ included this language in all contracts over \$1.0 million. Poage pointed out that since these requirements only applied to building projects and there were no building projects in the contract, the requirements did not apply.

77. By e-mail to Poage dated March 16, 2010, Ong explained that because the TRCI Amendment for MW Engineers’ emergency work was outside of the geographic scope of the OSP Contract, the Department had never had the protection of MW Engineers’ insurance or bond. Ong again recommended that the TRCI Amendment be cancelled and two new contracts be issued to cover the work.

78. That day, Poage responded to Ong that

“That’s what an amendment does . . . it modifies the contract, i.e.: changes the scope of services, or location, or schedule, or whatever. Amendment No. one specifically adds the work at TRCI. Even if someone cries foul that it was originally solicited for Salem area only, it is very unlikely that it would be challenged by the marketplace, or by audit in light of the magnitude of the TRCI emergency. We had the coverages of the consultant at TRCI because they signed a document saying that we did. Other attorneys have told me that it would valid [*sic*] in court if put to the test.

Whether our Contracts people or DOJ say the Amendment is invalid is another matter.

“First and foremost I want to be responsive in emergencies and look out for the security matters, and the safety of our staff, occupants, consultants and contractors. The Director delegated me authority to act, and to negotiate the contracts, and the methods I used were made in good faith and proved to be very effective in serving that number one priority.

“Secondly, I would like to make prompt payment to the companies that serve DOC in these types of responses. I would have moved forward to pay them promptly, and then cleaned up any procurement issues and audit concerns. I have done it before. I have been guilty of selecting those priorities for over 30 years. People and their safety first, payment for extraordinary services provided second, and paperwork third. Procurement officers and accountants usually disagree.

“It’s great when everything is in place prior to an unexpected emergency, but I have found that it is rarely the case. Usually you must be both quick and very decisive, and stay focused on the number one priority. I think both you and I and the balance of the TRCI response team did that, and now there is some clean-up to be done.

“I don’t care if after the fact there is a better way to get MW Engineers contracted and paid sooner. You are the project manager, and I take your recommendations seriously. You can work with our Contracts people and Vern to alter the contracting at TRCI if you want. That’s part of cleaning up any procurement and payment issues.”

79. For the period March 10 to March 31, 2010, DOJ submitted an invoice to the Department for 36 hours of services, in the amount of \$4,932.00. The invoice covered services on the ratification document and amendment drafted to address Poage’s authorization of the OSP Contract Phase 2 and 3 work and the invalid TRCI Amendment. Up to 22.5 hours of the DOJ services may have been related to the analysis of SEED and solar requirements.⁸

⁸It is impossible to know how many hours were spent on the SEED and solar energy requirements alone, since many of the descriptions which refer to this work also referenced other work.

80. On April 1, 2010, Ong requested that Duffey cancel the TRCI Amendment, and indicated he would transfer the funds out of that module and submit a contract request form for the emergency work.

81. Also, on April 1, 2010, Lemke and SIU Inspector Jacy Gamble interviewed Poage. During the interview, Gamble asked Poage about the OSP Contract, as follows:

“Gamble: When the specifications for OSP electrical developed, what was the expected outcome?”

“Poage: What do you mean by specifications?”

“Gamble: That would be the details, right? The. . .

“Lemke: Statement of work.

“Gamble: Statement of work, yeah.

“Poage: I don’t. They were developed before I went to work for DOC, so I’m not sure how to answer that.

“Gamble: Okay.

“Poage: I think the Statement of Work is in the contract, just basically replacing the electrical supply. Upgrading it to a different voltage.

“Gamble: Okay. Okay and what was your role in developing and approving the specifications for inclusion and the request for proposal documents?”

“Poage: I didn’t really have a role. If we’re talking about technical specifications and what the work, I didn’t play a role in that. It was, the first R[F]P was actually developed before I went to work here.”

82. Later in the interview, Gamble asked Poage questions about DOJ’s role in reviewing contracts, as follows:

“Gamble: Okay. It says explain your understanding of DOJ’s role, I’m sorry, role, after a contract has been executed.

“Poage: The only thing that I understand about that was after a certain dollar amount they’re required to review changes in the contract.

“Gamble: Okay.

“Poage: Or over a certain dollar amount.

“Gamble: Okay.

“Poage: The, I didn’t understand at the time where you have preauthorized project amount by the legislature and the department that every time you amended, like moved from design development to

schematic or whatever, that that required a Department of Justice of review. I mean, regardless of the amount, it seems wild to me, but I guess that is the case.”

83. When Gamble asked Poage about the obligations of a contract administrator, Poage initially responded “Well, I’m certainly learning them.” Poage then explained that “I guess I don’t fully understand the role of the contract administrator and the contract specialist and Jan Lemke’s crew. I think maybe that needs more definition.” Later, Gamble asked him about the role of the contract administrator in regard to the OSP Contract. Poage explained that he now understood all he was authorized to do was negotiate the next phase, but could not tell the consultant to proceed with the work or execute anything, and that each phase had to be approved by DOJ and signed by the Director. Poage stated he thought the trigger that set up the DOJ review was anything over \$100,000.

84. Gamble also asked whether Poage had seen Duffey’s October 20, 2009 Memorandum outlining the contract process, to which he replied:

“Poage: No. I don’t remember seeing it. But I wouldn’t have. You know, I don’t, I wouldn’t have automatically thought that Kay Duffy⁹ would be outlining the process. I mean unless it was flagged. If Jan [Lemke] would have sent it, I probably would have, and mentioned the tape, that is how we have to do it, you know, I . . .

“Gamble: Okay.

“Poage: Uh, again, you know, I had meetings with these guys and Kay Duffy about a year ago and best practices for RFPs and different things and this kind of looks like it would have been a good next step to that process.

“Gamble: Okay.

“Poage: And maybe that was her intent. But I haven’t, I haven’t reviewed it.

Gamble: Okay. Thank you.

“Poage: Was it, was there something (inaudible) was it about this job?

“Gamble: Would have been October 2009 so I don’t know, I don’t know what would have triggered that.

“Poage: Well, I get tons of stuff. If it wasn’t flagged specifically for this, about OSP electrical or Coffee Creek (inaudible) or

⁹Duffey’s name is incorrectly spelled as Duffy throughout the investigation transcript.

whatever, I wouldn't have, I would have thought it's just another internal . . .

"Gamble: Stuff, yeah.

"Poage: Stuff."

85. When Gamble asked about the Contracts Unit's involvement in contract amendments, Poage responded "I don't know for sure if it goes, if the Contracts unit sees it before Tammy [Dohrman] or not. On amendments." Gamble also asked about the authority and responsibility of the Contracts Unit and the DPO.

"Poage: Preparation and administration of the contracts.

"Gamble: Okay.

"Poage: And, you now, the procurement that leads up to.

"Gamble: Okay. Okay so this kind of goes with the same line – where does the authority to create and execute contracts, amendments, that would be the Contracts unit, is that correct?

"Poage: No, I don't think there's any authority in their unit. I think the authority is at the assistant director's level.

"Gamble: Okay. To create and execute contracts? That would be it?

"Poage: No, the execution.

"Gamble: The execution?

"Poage: We all participate in helping in the creation of it.

"Gamble: Okay.

"Poage: Different statements of work or questions of procurement or whatever. As far as I know the assistant director executes everything."

86. Later, Gamble asked Poage to explain the contract process before it was executed. Poage first explained that since he was only directly involved in a few projects, his understanding was not as good as that of his project managers. He then stated:

"I know that we are involved with getting the scope of work together and the schedule and presenting the whole thing. And we work with Contracts in getting that buttoned up. Then we have to send it in to the budget office to get it approved to move forward. Nathan Allen's people. They review it and make sure that the cost's entered and it's funded and so on and so forth. Then it goes back to Contracts. In the case of this, the consultant contract, I think, and they're doing this all electronically now. There's no paper. And they [*sic*] Kay Duffy sends it back out to the

contract administrator, which is usually a project manager with the final thing and ask for a go ahead.”

87. Gamble also asked Poage to explain why the TRCI Amendment did not go through the Contracts Unit. Poage replied:

“The, I asked our people to check about how soon they could get it out. And they didn’t get, this is my assistant and Scott Graves, the project manager, they couldn’t get a very good answer on that and that’s typical. I mean they kind of get thrown on the stack and they get to them in the order they come in, when they can or they might prioritize if you twist their arm or whatever. I told my assistant, do it word for word, just like they do it. We’ve got to get this binding. Because the contractor is there. They go to work just on your phone call. I didn’t think that was illegal or anything too far out of bounds because it’s the exact document, as I understand it, that they would send out. And it was just a matter of we needed to move very quickly on some of this stuff.”

88. Finally, Gamble asked Poage if he had ever initiated emergencies that were not true emergencies. Poage replied:

“Well the, what’s a true emergency. And I’m not trying to be devil’s advocate. But the, I can pull you out the Attorney General’s book and tell you their definition of what constitutes an emergency. And I can tell you that in good faith I haven’t done that [*sic*] weren’t true emergencies according to the guidelines. You know, and as I told Daryl, there’s the guidelines, you know like the first one would be, could have been foreseeable, you know, through inspection or whatever. Well inspection of the card reader systems at Snake River and that they were going bad could have been foreseeable. So, but like the superintendent over there tells me, when there’s 40 inmates and two guys and they have knives, I don’t care about the AG’s rules, this is an emergency situation. I mean, there’s a lot in between the lines of is it a true emergency. And that’s one of many examples. And it’s a very subjective call. And I’m in the position to make the call. My answer is still the same. No, I’m not declaring any phony emergencies. But the criteria is very subjective. And it’s not in the blue book.”

89. On April 12, 2010, Gamble provided the Department his investigation report. In one portion of the report, he referred to Poage’s statements that the role of the contract administrator needed to be better defined. In regard to this, he referenced the

attached "DRAFT" OAR-291-026-0050, which outlined the role of the contract administrator. (Poage was never provided this document during his employment.)

90. On April 14, 2010, Poage was duty stationed at home.

91. By letter dated April 19, 2010, Poage asked Senator Bruce Starr to make an official inquiry into the actions being taken against him in response to his attempts to clean up poor business practices in the Department and to provide him with whistleblower protection during the investigation under ORS 659A.203.¹⁰ Poage notified Starr of what he believed were seven poor business practices, including the Assistant Director's cover-up of the unauthorized purchase of goods and equipment related to Measure 57 implementation, splitting projects to avoid competitive bids, and issues with the RFP process. Dohrman had not seen Poage's letter to Starr prior to the hearing.¹¹

92. On April 29, 2010, Gamble interviewed Project Manager Graves as part of the Poage investigation. Graves told Gamble he was not aware that an amendment and DOJ review was required before each phase of the OSP Contract, he had not had any such restrictions in other contracts, and the process seemed cumbersome to him because the project would have to be shut down while waiting for the DOJ review. Graves also told Gamble that he viewed the investigation "as almost like a witch hunt," he thought that about ten percent of the people were causing 90 percent of the problems, he believed the employees were reluctant to change for a new administrator brought in from the outside, and he thought a few people were excited to see Poage being investigated.

93. On May 26, 2010, Gamble interviewed Project Assistant Patton. As a result of the interview, the Department became aware that Patton was still being paid a lead worker differential, but was no longer performing lead worker duties. Patton explained to Gamble that Rowan had told her she would continue to receive the pay due to her length of time in the Department. The total amount of the payment to Patton for the

¹⁰ORS 659A.203(1)(b)(A) and (B), sometimes referred to as the whistleblower statutes, make it an unlawful employment practice to impose discipline or retaliate against an employee who, in good faith and in response to an official request from a member of the Oregon Legislature, reports information that the employee believes is evidence of agency actions resulting in a violation of a law, rule, or regulation; mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health and safety.

¹¹There is also no evidence in the record regarding a response from Senator Starr.

lead worker differential for the pay periods of May 31, 2008 though June 30, 2010, was \$3,464.93.¹²

94. On November 15, 2010, the Department sent Poage a letter notifying him it was initiating a pre-removal process and that he could respond to the matters listed as the basis for the removal at a pre-dismissal conference on November 29, 2010, or in writing. Poage was provided a copy of the investigation reports and supporting documentation.

95. By letter dated November 23, 2010, Poage responded in writing that the information he had been provided, some of which were statements taken out of context and incomplete, was insufficient to allow him to respond. In addition, because he was duty stationed at home, he was denied access to other information that would have allowed him to respond. Poage stated his due process rights were being violated and the Department was taking punitive actions for his prior whistle-blower activities.

96. By letter dated December 2, 2010, the Department notified Poage that he was being removed from management service effective December 7, 2010, for being unable or unwilling to fully and faithfully perform the duties of his position satisfactorily under ORS 240.570(3). The letter states that Poage was removed because he:

a. Knowingly produced contract amendments without authorization and contrary to policy and advice from subordinate staff by: (1) authorizing work on additional phases of the OSP Contract without an amendment or a DOJ legal sufficiency review; and (2) preparing the TRCI Amendment to the OSP Contract. This amendment was outside of the scope of the OSP contract and was prepared without the Contracts Unit and against Ong's advice;

b. Acted in conscious disregard of Department wage standards by directing a subordinate manager to remove an employee's lead worker duties, but to continue paying her the lead worker differential after being advised that the differential no longer applied;

c. Made the following statements during his investigation interview that raised questions about his ability to perform the duties assigned to his position: that he failed to read or understand the requirements of the OSP Contract; that he failed to review the final OSP Contract; that he did not understand he had to go through the Contracts Unit to amend the OSP Contract; that he did not fully understand the role

¹²Since the reorganization was not even announced until June 19, 2008, it is unclear why the Department included the May and June 2008 pay periods in this calculation.

and obligations of a contract administrator; that he did not know the DOJ legal sufficiency dollar threshold; and that he was unfamiliar with the government contract process because he was from the private sector.

d. Gave the following inaccurate or untruthful answers during the investigatory interview:

- “1. You stated that the OSP specifications were developed before you came to DOC and that you had no role in their development when in fact you cancelled the original RFP that was developed because you did not feel it was written correctly. The only thing added to the amended RFP was ‘mechanical repairs for the greater Salem area’.
- “2. When asked if you understood the role of the contracts unit, you stated ‘they prepare and administer contracts.’ Earlier in the same interview you also stated that you could do an amendment. In fact you wrote a memo on 1/9/09 to Ms. Lemke, Contracts and Procurement Manager, that said ‘You own the contract processes and the forms and procedures related to them.’ And ‘the official documents of contracts and change orders are yours to pursue and develop.’
- “3. You told Ms. Gamble that you remembered some ‘best practice’ meetings you had had, but could not recall if the contract process was discussed. *Note: Towards the end of 2008, you had meetings where you had Jan Lemke and Scott Petterson from Contracts and Procurement explain the procurement process to Paul Stanley so that you could hold Paul accountable.*
- “4. Regarding ‘Emergency Declarations’ you said you did not know when or why the change was made. **Note:** In a subsequent interview with Vern Rowan, he stated that you directed him to specifically change the wording on the Emergency Declaration from Contracts Manager to Facilities Administrator.”

e. Caused the misuse of taxpayer funds because the Department incurred a penalty from the vendor and additional DOJ charges in replacing the TRCI Amendment with a new contract and 31 months of lead worker differential overpayment;

f. Expressed a willingness to knowingly disregard laws, rules, and policies, specifically the DOJ's guidelines on the definition of an emergency; and

g. Disregarded information from subordinate staff by (1) failing to read Duffey's memorandum of contract procedures and stating he did not normally read e-mails from non-management employees; (2) ignoring Ong's recommendation that the TRCI Amendment be cancelled and a separate contract prepared; and (3) telling Patton, after she told him that Department process was to go through the Contracts Unit to prepare contracts, that he would write a contract if he wanted to.

97. The removal letter concluded:

"The conduct set out above raises serious concerns regarding trustworthiness and competence. It also falls below the minimal standards this Department can reasonably expect from its managers, who must use the authority of their position responsibility [*sic*] for the safety and welfare of others and acting as a role model for subordinate staff. While not exhaustive, listed below are examples of some of the concerns.

"You have slightly over two years with the Department. This is not a period of sustained compliance with Department standards and reasonable expectations to mitigate the blatant actions you undertook. Examples are disregarding pay standards and continuing to pay a staff member for a work status that had been removed. You should have been aware of the standards and were expressly advised about them as well. Yet you ignored the standard and advice. You ignored both policies and staff advice regarding contract matters in a similar manner.

"In light of the facts that others advised you on how to conduct business, including your own subordinates, your claim not to know or understand how you should have proceeded lacks credibility. In effect, you claimed ignorance of standards and policies that you were expected to personally follow as well as ensuring that subordinate staff adhered to them. Your explanation during the interview process was essentially an excuse that was inherently improbable to believe given the entire context of your work performance during relevant times. Even assuming your ignorance, that alone would be a ground supporting removal from management service.

"The Department has lost faith in your ability to exercise reasonable judgment on its behalf and does not trust that you have demonstrated an understanding that could lead to continued employment. Your credibility

has been irreparably damaged in your role as a manager in this agency. Some of the above described matters, standing alone, warrant removal from management service. The conduct goes beyond simple poor performance and shows a conscious disregard of Department expectations that were known to you.”

98. During the hearing, Assistant Director Dohrman testified that the geographical scope of a contract could be modified through a contract amendment.

99. Under the category “Misuse of Official Department Position,” the Department’s Code of Conduct policy prohibits an employee from using their position for

- “a. Personal or financial gain, or partisan political purpose.
- “b. Obtaining privileges not otherwise available to them except in the performance of duty.
- “c. Avoiding consequences of illegal acts.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Poage’s removal from management service did not violate ORS 240.570(3).

Standards of Proof

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.” The Department has the burden of proving that its discipline was consistent with 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).

We apply a two-step analysis in reviewing management service appeals. We first determine whether the employer has proven the charges which are the basis of the discipline. The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15. If we find that the employer has proven some or all of the charges, we then apply

a reasonable employer standard to determine if the employer was justified in taking the disciplinary action it did. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied*, (September 2006). 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). A reasonable employer also clearly defines performance expectations, and tells employees when those expectations are not being met. *Id.* In addition, 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). Finally, “[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).

A significant factor in our consideration of management service discipline 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. [Footnote omitted.] 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.)

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).

We apply these standards to evaluate the Department’s dismissal of Poage. We begin by considering whether the Department proved the charges upon which the dismissal is based.

Charge I: Produced contract amendments without authorization and contrary to policy and advice from subordinate staff.

The Department proved that Poage made unauthorized amendments to the OSP Contract. The OSP Contract specified the amount to be paid to the consultant, MW Engineers, for Phase 1 of the electrical work to be performed at the Oregon State

Penitentiary in Salem. The contract specified that before work could begin on Phases 2 through 6 of the project, the parties would negotiate the amount to be paid to the consultant for these phases and execute an amendment to the contract. Poage knew that the General Services Assistant Director was the only person designated to sign contracts. (Finding of Fact 19.) Poage also knew that it was essential to involve the Contracts Unit in contract preparation; in discussions with Contracts Manager Lemke about this process, Poage noted in a January 9, 2009 e-mail that “the official documents of contracts and change orders are yours to pursue and develop” and that the Contracts Unit “own[ed] the contract processes.” (Finding of Fact 25.)

In amending the OSP Contract, Poage did not comply with the requirements of the contract or with appropriate Department procedures, as he understood them. Instead, in letters dated October 29 and December 11, 2009, Poage instructed the consultant to begin work on Phases 2 and 3 of the OSP Contract and specified the amount to be paid to the consultant for this work. (Findings of Fact 46 and 49.) He never involved the Department’s Contracts Unit and never sought the signature of the General Services Assistant Director to authorize work on Phases 2 and 3 of the OSP Contract. Poage’s letters, in effect, constituted unauthorized and unenforceable amendments to the contract. (Finding of Fact 64.) The consultant was placed at significant risk because the consultant proceeded with work valued at over \$400,000 without appropriate authorization. In addition, Poage’s actions delayed payment to the consultant for work performed and required additional Department staff time to correct his error.

Poage argues that his conduct should be excused because he was unfamiliar with contracts that required amendments before each separate phase. In addition, Poage asserts that it was unusual for a Facilities Services’ contract to require amendments to authorize additional phases of a project, and contends that such a requirement made little sense due to the type of contract at issue. None of these arguments justifies Poage’s failure to understand and comply with the requirements of the OSP Contract. Because the contract explicitly said so, Poage should have known that the OSP Contract required amendments to authorize additional phases of the work. He was the authority responsible for reviewing and recommending this multi-million dollar contract to Assistant Director Dohrman. By signing the contract, Poage attested that he had reviewed the contract and recommended that Dohrman sign it.

Poage also defends his conduct on the grounds that he was not alone in failing to read and understand the OSP Contract. Poage notes that Department Assistant Director Dohrman, who signed the OSP Contract, and Business Manager Rowan, who was responsible for paying the invoices submitted for payment under the contract, “and a host of others knew that Appellant had no authority to authorize or amend contracts.

Yet all of these people were reviewing MW's [Engineers] work product over a 6 month period, reading reports on the progress, and/or had knowledge of the invoices stacking up for the completed work." (Appellant's Objections, p. 15.) Poage's argument is unpersuasive. It was Poage's responsibility—and not the responsibility of Rowan or any other Department staff member—to review the OSP Contract and make a recommendation about its approval to Dohrman. Poage could not reasonably expect that other Department employees would do his job.

The Department also proved that Poage acted contrary to Department procedures when he prepared an invalid amendment to cover MW Engineers' work on the TRCI project and recommended that Dohrman sign it. Some time prior to January 2010, Poage realized that no contract had been prepared to cover emergency work performed by MW Engineers at TRCI. Poage directed his assistant to prepare an amendment to the OSP Contract for the TRCI work. Poage chose to prepare the amendment himself rather than involve the Contracts Unit because he wanted to pay MW Engineers as soon as possible. (Finding of Fact 53.)

Poage knew, or should have known, that it was essential to work through the Contracts Unit to prepare the TRCI Amendment. As discussed above, Poage told Contracts Manager Lemke on January 9, 2009, that the Contracts Unit "own[ed] the contract processes." At his April 1, 2010 interview with SIU Inspector Gamble and Lemke, Poage again acknowledged that the role of the Contracts Unit as part of the General Services Division was to prepare and administer contracts. (Finding of Fact 85.)

Poage's own actions regarding the preparation of the TRCI Amendment also show that he understood that the Contracts Unit should have been involved in preparing that amendment. As he explained during the investigation, he only prepared the amendment himself after he was unable to determine how long it would take the Contracts Unit to prepare it. Poage would have had no reason to check on the Contracts Unit's availability if he did not understand that they were responsible for preparing contract amendments. His statement that he did not think his actions were "illegal or anything too far out of bounds" clearly indicates that he understood he was not following the normal process. (Finding of Fact 87.)

Poage contends, however, that that the Department had no regular procedure for preparing contract amendments:

"The volume of testimony about the confusion surrounding contracts, change orders and amendments (and the various attempts to properly route and review them) clearly highlights that there was no 'normal' process for contract amendments." (Appellant's Objections, p. 14.)

Poage's actions cannot be excused on the grounds that he was confused about the role of the Contracts Unit in contract preparation. Although Poage and Department staff members engaged in numerous discussions (and sometimes disagreed) about contract procedures, there was never any disagreement about the Contracts Unit's involvement in the process. After an August 13, 2008 meeting on the issue of contract routing, Poage sent staff a form that had been agreed upon at the meeting. (Findings of Fact 18 and 19.) When Poage explained the August 2008 routing agreement to Department staff, he noted that it required that the project manager and contracts specialist work together to finalize a contract or an amendment to a contract before Poage and Rowan reviewed and forwarded the final contract to the consultant or the contractor for a signature. Poage and Contracts Manager Lemke subsequently discussed this form, and the only issue on which Lemke and Poage could not agree was who would send the contract to the contractor for signature. Lemke wanted the Contracts Unit to submit the contract to the contractor for signature and Poage apparently did not. Poage never challenged the necessity of involving the Contracts Unit in the contract preparation process, however. As discussed above, Poage told Lemke on January 9, 2009, that he understood that the Contracts Unit "own[ed] the contract processes."

Poage also argues that the Department did not prove its charge that the TRCI Amendment he made to the OSP Contract was invalid because it covered electrical repairs that were outside of the geographic scope of the OSP Contract. Poage contends that the Department admitted that, in some cases, a contract amendment could be used to modify the geographic scope of a contract. Even if we agree that the Department sometimes amended a contract to change the contract's geographic scope, the Department proved that the amendment was invalid for another reason. The TRCI Amendment did not just modify the geographic scope of the OSP Contract; it attempted to cover work not included under the OSP Contract. As a result, the DOJ determined that the TRCI Amendment was legally unenforceable because it was outside of the scope of services provided for under the OSP Contract.

Finally, Poage apparently argues that he should not be held accountable because he was only doing his best to address an emergency situation. However, the Department did not charge Poage with inappropriately addressing the TRCI emergency. Contrary to Poage's assertion, the evidence shows that Poage responded correctly to the emergency until he created the amendment to cover the consultant's emergency work. At that point, Poage acted contrary to Department procedure by failing to involve the Contracts Unit in preparing the amendment.

The Department's charge that Poage prepared the TRCI Amendment against Ong's advice lacks merit. On March 9, 2010, Ong recommended to Poage that the TRCI Amendment be cancelled and that the Department enter into two contracts with MW

Engineers to cover the work at TRCI. Ong's recommendation was made two months after Poage prepared the TRCI amendment and obtained Dohrman's signature on it. Poage can hardly be found to have violated advice he was not aware of at the time he entered into the TRCI Amendment.

Charge 2: Acted in conscious disregard of Department wage standards by directing a subordinate manager to remove an employee's lead worker duties but to continue paying her a lead worker differential after being advised that the differential no longer applied.

The Department did not prove that Poage directed Rowan to continue paying Patton the lead worker differential after Poage was advised that the differential pay no longer applied. Poage and Rowan were the only witnesses to the conversation about the effect of the reorganization on Patton's pay. As explained in our Findings of Fact, we found the testimony of both witnesses equally persuasive. Therefore, we rule against the Department, which has the burden of proof. (Finding of Fact 16 n 1.)

The Department also argues that Poage was culpable because, based on his responsibility for the Facilities Services' budget, Poage should have known that Patton continued to receive a differential pay to which she was not entitled. This is not the charge that was the basis for Poage's removal, however. In addition, there is no evidence that a specific expectation of Poage's position was to be directly responsible for the accuracy of the pay for all Facilities Services' employees. In fact, Poage was apparently unaware that Patton was receiving lead worker pay until Rowan told him about it. Therefore, the Department did not prove this charge.

Charge 3: Made statements during his investigation interview that raised questions about his ability to perform the duties assigned to his position.

The Department proved it had reason to be concerned about Poage's ability to perform his duties as the Facilities Services' Administrator and as a contract administrator based on his statement at the April 1, 2010 interview that he never read the OSP Contract. As the Facilities Services' Administrator, Poage was responsible for signing and recommending approval of contracts to the General Services Assistant Director. In exercising this responsibility, he signed and recommended approval of the OSP Contract without reading it, even though he knew that DOJ may have modified the contract draft he had previously reviewed. As a result of his failure to read the contract, the consultant proceeded with work valued at \$400,000 under contract amendments that were unenforceable. Therefore, the Department had a legitimate concern about Poage's failure to read the contract.

The Department also proved it had reason to question Poage's ability to perform his duties based on his statement at the April 1 interview that he wanted to save time and did not understand that he had to go through the Contracts Unit to amend the OSP Contract. As previously explained, we conclude that Poage understood the role of the Contracts Unit and knew that it must be involved in preparing contracts. Poage was also hired with the understanding and expectation that he would help the Department regain credibility by ensuring that Department employees followed appropriate policies and procedures. Therefore, Poage's statement regarding the role of the Contracts Unit reasonably caused the Department to question his ability to meet this expectation.

Poage's statement at the April 1 interview that he did not fully understand the role and obligations of a contract administrator did not raise any reasonable doubts about his ability to perform his duties. As Facilities Services' Administrator, Poage needed to have a general understanding of a contract administrator's duties. Prior to the OSP Contract, Poage had never served as the contract administrator and was provided no training on the duties of the position. Under these circumstances, the Department could not expect Poage to have a detailed understanding of a contract administrator's role. In addition, the Department appeared satisfied with Poage's understanding of his work as OSP Contract administrator; the Department never challenged Poage's explanation that he understood his work as the OSP Contract administrator was limited to negotiating the scope and cost of the subsequent contract phases.

Poage's statement at the April 1 interview that he did not know the dollar threshold in a contract that required a DOJ legal sufficiency review does not provide a legitimate basis to question his ability to perform his duties. Poage clearly knew that contracts costing a certain dollar amount required DOJ review. The Contracts Unit—not Poage—was responsible for sending contracts to DOJ for their review. Therefore, Poage's ignorance of the DOJ dollar threshold raised no concerns about his ability to perform his job.

Finally, Poage's statement at the April 1 interview that he came from the private sector where contracts are written and administered differently did not raise legitimate concerns about his ability to perform his duties. The Department failed to explain how this statement, which was likely true, caused the Department to lose confidence in Poage's abilities. This charge is both vague and unsubstantiated.

Charge 4: Gave inaccurate or untruthful answers during the investigatory interview.

The Department proved that Poage made an inaccurate statement at the April 1 interview when he said that he understood he could prepare an amendment. As

previously discussed, Poage knew that the Contracts Unit prepared and administered contracts and also knew that he should have worked with the Contracts Unit to prepare the TRCI Amendment. Therefore, this charge has been substantiated.

The Department did not prove the other conduct upon which it bases this charge. The Department claims that Poage untruthfully said at the April 1 interview that he did not have a role in developing the technical specifications for the statement of work to be performed in the OSP Contract. Poage's statement is correct, however. The technical specifications for the first RFP for electrical upgrades at OSP were developed before Poage began working at the Department; these specifications were incorporated into the second RFP with minimal change.

The Department also charges that Poage inaccurately or untruthfully stated at the April 1 interview that he remembered attending some "best practices" meetings, but could not recall if the contract process was discussed at these meetings. Poage's inability to recall what was discussed at these meetings may be evidence of a faulty memory, but it is not evidence of untruthfulness. In addition, it is likely that Poage did not remember what happened at the meetings to which the Department refers; these meetings were held in 2008 and Poage was not questioned about them until April 2010.

Finally, the Department charges that Poage inaccurately or untruthfully stated that he was unaware of any change in the emergency declaration form. In support of this charge, the Department refers to an interview with Facilities Services' Manager Rowan in which Rowan stated that Poage directed him to change the wording on the emergency declaration form. The record is devoid of any evidence of this interview. The only evidence about changes to the emergency declaration form concerns the new emergency declaration template Lemke sent Rowan in December 2009; there is no evidence that Poage was involved in preparing this template or even knew about it.

Charge 5: Caused the misuse of taxpayer funds because the Department incurred (1) a penalty from the vendor and additional DOJ charges to replace the TRCI Amendment to the OSP Contract with a new contract; and (2) 31 months of overpayment of lead worker differential.

The Department failed to prove that Poage's actions resulted in misuse of taxpayer funds. Because we have found that the Department did not prove that Poage was responsible for overpayment of Patton's lead worker differential, the Department failed to prove that Poage caused the misuse of taxpayer's funds in this regard. The Department also claims that Poage caused the misuse of taxpayer funds because the Department incurred a vendor penalty and additional DOJ charges to replace the TRCI Amendment with a new contract. The record contains no evidence of any vendor

penalty, however. Nor does the record contain proof of how much DOJ charged the Department for work related to the TRCI Amendment. The only DOJ bill in the record—one in the amount of \$4,923—covers work done on Phases 2 and 3 of the OSP Contract, the TRCI Amendment, SEED, and solar requirements. It is impossible to tell from this bill how much of this work involved only the OSP Contract and TRCI Amendment. (Finding of Fact 79 n 8.)

Finally, even though the Department incurred some unspecified additional costs as a result of Poage's actions, it failed to prove that these expenditures were a "misuse" of taxpayer funds. The Department relies on no policy violation to support this charge. The general meaning of the term "misuse" is to use incorrectly, carelessly, or for a wrong or improper purpose. *Webster's Third New Int'l Dictionary* 1447 (unabridged ed 2002). The Department presumably had authority to pay DOJ for advice to correct Poage's errors, as it did in this case; as a result, its payment to DOJ did not constitute an improper use of funds. The Department's Code of Conduct policy concerning "Misuse of Official Department Position" is inapplicable here. There is no allegation that Poage or any other Department employee used the Department for personal or financial gain, political purpose, obtaining privileges, or avoiding consequences of an illegal act. Therefore, the Department did not prove this charge.

Charge 6: Expressed a willingness to disregard laws, rules, and policies.

The Department did not prove the charge that Poage expressed a willingness to disregard laws, rules, and policies. The Department asserts that during his April 1 interview Poage said that in a true emergency he did not care about the AG's rules. While Poage said this, the Department took Poage's statement out of context. During the interview, Poage spoke about the difficulties inherent in the AG's guidelines regarding emergency declarations. Poage attempted to explain that the emergency declaration criteria were subjective and sometimes difficult to apply when an actual emergency occurred. Poage's comments, when taken in the proper context, concerned the interpretation of the AG emergency declaration criteria, and did not demonstrate a willingness to disregard these criteria. We find this charge to be unsubstantiated.

Charge 7: Disregarded information from subordinate staff.

The Department failed to prove its charge that Poage disregarded information from subordinate staff. Poage admitted that he did not read Duffey's October 29, 2009 memorandum that included, as an attachment, a guide to the process for preparing contracts. The memorandum itself indicated that it concerned the Contracts Unit's internal process and was unrelated to any specific project in which Poage was involved, however. Nor did the Department show that Poage had been directed to read all e-mails

sent to him by Duffey. Poage had extensively discussed the contract routing process with Lemke; he would have no reason to think that Duffey had any involvement in these matters. Therefore, Poage cannot be held responsible for failing to read one of numerous internal e-mails on a topic that he understood did not directly affect Facilities Services.

The Department also failed to prove its charge that Poage ignored Ong's advice about the TRCI Amendments. On March 9, 2010, after Poage prepared the TRCI Amendment and obtained Dohrman's signature on it, Ong recommended that Poage cancel the amendment and execute two new contracts. Contrary to the Department's assertion, however, Poage treated Ong's recommendation with respect and deference. Poage initially questioned Ong's recommendations. After Ong explained his concerns, however, Poage authorized Ong to change the contract.

Finally, the Department presented no evidence to support the charge that Poage disregarded Patton's statement that Department process was to go through the Contract Unit to prepare contracts.

Level of Discipline

Since the Department has proven some of its charges, we must next "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). Based on all of the circumstances of this case, we hold that it is.

Although Poage seeks to minimize the conduct that is the basis of his removal, we conclude that he committed significant errors in judgment. He failed to read the multi-million dollar OSP Contract on which he was the designated reviewer, recommender, and contract administrator. As a result, he prepared legally unenforceable contract amendments. Contrary to Department practice, he prepared the TRCI Amendment with no involvement of the Contracts Unit. Consequently, he recommended that Assistant Department Director Dohrman sign an amendment that created another legally unenforceable contract obligation. The total value of the work involved in these unenforceable contract amendments was almost half a million dollars—\$470,000 for the work on Phases 2 and 3 of the OSP Contract and \$20,000 for the TRCI Amendment. Poage's actions placed him, the Department, and the consultant at potential legal and financial risk and caused a delay in payments to the consultant. His actions also resulted in additional work and expense to the Department to correct his errors and authorize the delayed payment.

Poage argues that his actions merit counseling or, at most, a lower level of progressive discipline. He points out that he was hired to make changes in the Facilities

Services' processes, which he successfully did, and his only evaluation reflects that he excelled in his performance. Poage asserts that the mistakes he made were unintentional and occurred because he received inadequate training and support. He also contends that the Department used his mistakes to conduct a fishing expedition into all of his activities so it could find a reason to remove him, but that the real reason he was removed was his "whistleblower" activities, with which Department managers and employees disagreed.

Poage is correct in his assertion that the Department never provided him with specific training in the role of the contract administrator and the Department's contract process. And while Poage had significant experience as a private sector project manager, he had little experience with the numerous rules, regulations, policies, and practices involved in preparation and administration of public contracts. Yet Poage's inappropriate conduct regarding the OSP Contract and the TRCI Amendment did not result from a lack of training or inexperience with the public contract process. It resulted from Poage's failure to read the OSP Contract and his intentional disregard of a process he knew was essential to the preparation of the TRCI Amendment—involvement of the Contracts Unit.

We also do not agree that the Department decision to remove Poage arose out of his "whistleblower" activities.¹³ It is clear that some employees, especially those in Facilities Services, did not like the changes Poage made in the bidding and procurement process. In addition, Poage disagreed with Lemke and other members of the Contracts Unit over the contract routing process. Assistant Director Dohrman was not as strong a supporter of Poage's work as Koreski; she allowed one of Poage's project managers to appeal to her over changes Poage proposed in the unit and, in September 2009, documented concerns she had about Poage with HR.

The conduct upon which the Department based its removal of Poage did not result from employees' dislike of Poage's "whistleblower" activities in attempting to correct irregularities in Department operations, however. Although Lemke's e-mails to other staff about Poage's handling of the OSP Contract and TRCI amendments portrayed Poage in a negative light, her criticism of Poage was based on Poage's failure to follow the appropriate contract processes for which Lemke was responsible. The criticisms of Poage that Dohrman and Lemke expressed in the e-mails they exchanged, their decision to communicate with Director Williams, and Dohrman's decision to

¹³We do not address here whether the Department violated ORS 659A.203. The appropriate venue to assert such a violation is through the Oregon Bureau of Labor and Industries or civil action in state or federal court. This Board does not have jurisdiction to hear such complaints. *Keller v. State of Oregon, Department of Transportation*, Case No. MA-07-10 at 8 (December 2010).

conduct an SIU investigation also arose out of Poage's inappropriate actions on the OSP Contract and the TRCI Amendment. Dohrman's assertion that Poage should have e-mailed documents Duffey requested rather than hand-delivering them certainly makes little sense. Yet Dohrman sent this e-mail because she was frustrated by Poage's slow response in providing the information necessary to correct his errors. The focus of the investigation, which resulted in the removal decision, was also limited to matters related to the OSP Contract and TRCI Amendment, and did not involve any of Poage's conduct that could be characterized as "whistleblower" activities.

We conclude that the Department's decision to remove Poage from his position, instead of addressing his conduct through progressive discipline, is reasonable under the circumstances. Poage was in a position of significant responsibility. The work he carried out and oversaw had the ability to substantially affect the Department's credibility, which the Department was trying to improve and which Poage had committed to help the Department regain. His failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility.

The Department lost trust in Poage, based on his failure to review the OSP Contract and his preparation of contract amendments that were legally unenforceable. Assistant Director Dohrman could no longer rely on Poage to perform these tasks, which were an important part of his job duties. The Department's confidence in Poage's abilities was further eroded by statements he made at the April 1 investigatory interview; one was inaccurate or untruthful and others raised concern about his ability to perform his job. As discussed above, a significant factor in our review of a removal from management service is "the damage done to the relationship of trust between and employer and the employee." *Greenwood* at 36. Poage's actions severely damaged the Department's ability to trust his judgment. This loss of confidence justified the Department's decision to remove him from management service.

Furthermore, Poage did not seem to understand the nature and seriousness of his misconduct. Poage did an excellent job improving processes within his own unit and worked hard to curb attempts in his unit to shortcut or side step the bidding process and requirements. He failed to recognize or acknowledge the same need for strict adherence to existing procedures and rules regarding the work of the Contracts Unit.

As the Facilities Services' Administrator, Poage served as a model for his subordinate employees whose adherence to proper procedures he was trying to ensure. His failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards. This is especially true because, instead of admitting that he had made mistakes and taking clear responsibility

for his conduct, Poage continued to insist that his actions should be excused or that his errors were not serious.

In sum, the Department lost trust in Poage because of his inability to fully and faithfully perform the duties of his job, his refusal to acknowledge his misconduct, and his resulting inability to serve as an appropriate supervisor. The Department's decision to hold Poage to such high standards of conduct was not arbitrary or unreasonable. Poage's length of service is insufficient to affect the Department's decision to remove him. Based on all of the circumstances in this case, the Department reasonably concluded that Poage was unable or unwilling to satisfactorily perform the duties of his position. His removal from management service did not violate ORS 240.570(3).

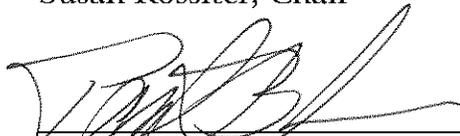
ORDER

The appeal is dismissed.

DATED this 9 day of April 2012.



Susan Rossiter, Chair



Paul B. Gamson, Board Member

*Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Logan did not participate in the deliberations and decision in this case.