

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-20-10

(MANAGEMENT SERVICE/SUSPENSION)

PAMELA KONSTANT,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT)	AND ORDER
OF STATE LANDS,)	
)	
Respondent.)	

Neither party objected to a Recommended Order issued on March 21, 2012, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing on May 9 and 10, 2011, in Salem, Oregon. The record closed on June 7, 2011, with the submission of the parties' post-hearing briefs.

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Appellant.

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

On December 30, 2010, Appellant Pamela Konstant filed this timely appeal of the decision of the State of Oregon, Department of State Lands (Department) imposing a one-week suspension for alleged misconduct, malfeasance, and other unfitness to render effective service. The Department alleges that Konstant committed numerous errors in her work as the Department's Fiscal Manager despite repeated direction and prior discipline.

The issue is:

1. Did the Department violate ORS 240.570(3) when it suspended Appellant for one week without pay, effective January 3, 2011, for inability or unwillingness to fully and faithfully perform the duties of her position satisfactorily?

RULINGS

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

FINDINGS OF FACT

1. The Department is an agency of the State of Oregon which manages state lands, receives lost property and intestate estates, and places the funds generated from these sources into the Common School Fund.

2. In 2003, Konstant was hired as the Department's Fiscal Manager, a Principal Executive Manager D (PEM D) level position in management service.¹ The Fiscal Manager is responsible for managing the Department's Fiscal and Estates Administration Section, which includes eight employees. At the time of hearing, Konstant reported to Cynthia Wickham, the Assistant Director of the Finance and Administration Division; when hired, Konstant reported to Wickham's predecessor, Jeannette Holman. Wickham and Holman reported to Department Director Louise Solliday.

3. According to her 2010 position description, Konstant's duties include supervising the staff of the Fiscal and Estates Administration Section; ensuring that staff provide accurate and timely fiscal data; developing and implementing long- and short-range goals and objectives for the Section; evaluating Section procedures, forms, policies, operations, and programs, and proposing and implementing necessary changes; developing, organizing, and coordinating financial information for the Department's budget; providing financial information for analysts from the Department of Administrative Services (DAS) and other agencies and the legislature regarding the budget; providing oversight of all accounting events such as payroll, accounts payable, accounts receivable, cash receipts, grants, contracting, and purchasing; reviewing and analyzing staff work to verify accurate entries into SFMA² and ensuring that all SFMA tables and profiles contain proper reporting and posting; planning, developing, recommending, and implementing new accounting techniques, and modifying existing systems and procedures to meet statutory requirements and legislative mandates; developing and producing accurate and timely budget execution reports on a monthly basis; developing and producing accurate and timely reports of grant revenues and expenditures, contract commitments, and remaining balances; overseeing the

¹Prior to that, Konstant had worked in various positions in state and local governments (primarily Oregon state government) beginning in 1988.

²SFMA stands for Statewide Financial Management Application, a state accounting and database program.

administration of the Estates program and forfeitures to ensure that the Department's authority is appropriately exercised and that adequate controls are in place to protect decedents' assets until distribution; reviewing policies and procedures to make certain that investigations and research are complete and professional, and that adequate internal controls are clearly defined and observed; and managing the sale of items from estates and forfeitures.

4. In November 2006, Holman gave Konstant her first performance evaluation as Fiscal Manager. Holman rated her as exceeding expectations in nine categories, and meeting expectations in 13 categories. Konstant was rated as needing improvement in five categories: work product accountability, working well with others, admitting mistakes and learning from experience, meeting key deadlines, and keeping appropriate people informed of important work-related changes and developments.

5. As part of that evaluation, Holman directed Konstant to work on goals of providing accurate, timely, and understandable monthly reports; improving communication with Holman, fiscal analysts, and other managers; and meeting deadlines "with days to spare."

6. On December 7, 2007, Department Director Solliday sent an e-mail to Holman and Konstant. Solliday stated that from the beginning of her one and one-half year tenure as Director, the Department had problems with timely processing of payables and receivables and the accuracy of monthly reports. Solliday stated that, as of the date of her e-mail, the Department was almost six months into the biennium and did not have accurate information on where it stood financially. Solliday stated:

"I have tried to be patient. I was optimistic that things would all be lined up starting with the 07-09 biennium and the issues would have been resolved. They have not. And I am tired of the finger pointing and the excuses.

"I want you two to work together with the fiscal staff to identify the problems, develop solutions and implement them. If you need to pull in other staff, do so- that includes other members of the Exec Team or anyone else in the agency you think would be helpful in identifying problems and identifying solutions.

"My expectations are that bills will be paid on time and correctly coded, revenue will be coded correctly and recorded in a timely manner, and accurate monthly reports be provided to managers.

“Managers cannot manage their programs within the context of a budget unless these expectations are met. We are almost six months into the biennium and we do not have accurate information on where we stand financially. This is unacceptable.” (Emphasis in original.)

7. On March 31, 2008, Director Solliday issued a letter of reprimand to Konstant for providing some inaccurate and late reports:

“The position you hold requires that the agency be able to trust the information you provide is accurate and a true reflection of the budget to enable all managers to effectively manage their programs and divisions. Your continued negligence and oversight relating to your fiscal responsibilities, your failure to provide accurate financial information to the management team, and your inability to manage your staff has diminished your credibility within the agency.

“Accurate financial information is a necessity to ensure that all operational needs and staffing can be met. By providing ongoing inaccurate information, you negatively impact all divisions and create additional workload to managers and other staff requiring them to verify and review each charge for accuracy. In addition, incorrect budget and financial information places this agency at risk and greatly compromises the ability to maintain and operate programs and services.

“I expect immediate and permanent correction to the deficiencies listed in * * * this letter. Failure to correct your performance deficiencies will result in further disciplinary action up to and including dismissal from state service.”

8. On June 1, 2008, Cynthia Wickham became Appellant’s supervisor.

9. In May 2009, Wickham gave Konstant a performance evaluation with “needs improvement” marks in the areas of ensuring that work product accountability is established and work output is accomplished; reliability and commitment in support of departmental goals and objectives; recognizing the need for policy change and providing input in development of policies; and adhering to state and agency policies and procedures. Wickham also gave Konstant a list of performance expectations. Nevertheless, Wickham believed that Konstant’s job performance was improving.

10. In November 2009, Wickham gave Konstant a memo regarding Konstant’s progress in meeting the May 2009 performance expectations and goals. Wickham noted that although there was improvement in many areas, there were still four areas of

concern: (a) Konstant had directed her staff to dispose of an abandoned airplane that was not within the Department's statutory authority; (b) Konstant had directed her staff to improperly account for vehicles purchased from estates; (c) Konstant provided "ball park" financial estimates to the Legislative Fiscal Office instead of producing actual or estimated figures through research; and (d) Konstant was responsible for much of the Department's significant under-recording of investment activities. In response to these issues, Wickham directed Konstant to develop and implement a plan to improve her performance.

11. Not having received Konstant's plan, on May 3, 2010, Wickham gave Konstant a May 21, 2010 deadline to complete it. Wickham gave Konstant a template for a detailed work plan. Wickham also gave Konstant a Work Improvement Plan regarding providing accurate and verifiable information, implementing appropriate policies and procedures, and utilizing communication and flexibility.

12. On June 11, 2010, Wickham issued Konstant a second written reprimand for failing to develop the work plan as instructed. Konstant ultimately submitted the work plan on July 30. We infer that at this point, if not before, Wickham began scrutinizing every aspect of Konstant's work and documenting her interactions with Konstant.

Conduct Cited in December 17, 2010 Suspension Letter

(1) Timesheet: Furlough Time

13. The relevant DAS "Frequently asked Questions" concerning furloughs stated in part:

" **Can a furlough be scheduled in hourly increments?**

" Schedule furlough days in full-day increments. This is eight hours for a full-time employee.

"* * * * *

" **What happens when an employee is called in mid-week on a furlough?**

" In an emergency or other appropriate circumstance, management may 'pull' an employee off of furlough status. The time already not worked on a furlough day remains reportable as 'LA.' The remaining

portion of the furlough day is rescheduled between management and the employee. The rescheduling will preferably occur within the same workweek or as soon as practicable.” (Emphasis in original.)

14. As a management employee, Konstant routinely flexed her time as needed. On July 12, 2010, Konstant had a scheduled furlough day. However, because of a work emergency and through no fault of her own, Konstant had to work one-half hour on the furlough day. She advised Wickham of the matter by e-mail, but the two did not discuss the effect of that half hour of work on Konstant’s scheduled furlough time. During the rest of the week, Konstant worked nine hours on Tuesday, ten hours on Wednesday, eight hours on Thursday, and four hours on Friday, July 16, for a total of 31 hours. Konstant informed Wickham of the hours she had worked through an e-mail, and Wickham approved the work on the furlough day. The two did not discuss the effect of that week of work on Konstant’s scheduled furlough time, or how to report that time. At the end of July, Konstant submitted a timesheet which included the week of July 12. Konstant reported eight hours furlough and eight hours worked each day Tuesday through Friday, as she would in a normal work week regardless of any additional hours she worked.

15. On August 5, 2010, at 1:19 p.m., Wickham e-mailed Konstant to tell her that she needed to correct her July timesheet:

“We need you to record your actual hours worked each day for the furlough week. Attached is the email you sent and I replied to, regarding your time that week. Please make corrections on your time sheet accordingly. Thanks.”

Konstant replied at 1:22:

“So, I'm seeing that did that...What am I missing? I see the furlough and then actual hours worked on the RG line.”

Wickham responded at 1:27, “[t]he timesheet in LF does not match what you indicated in your email of 7/16, which was attached to my initial email.”³ Konstant then submitted a timesheet reporting eight hours furlough *and* one-half hour worked for Monday, and the actual hours worked for Tuesday through Friday (nine, ten, eight, and four, respectively), and responded at 1:35, “It is in there.” Wickham replied at 3:50:

³Changing the timesheet as Wickham directed did not match Konstant’s July e-mail, because Konstant had not identified any other place besides Monday where she had taken furlough time.

"It still needs correction though. You worked a half hour on your furlough day, so it should be recorded as 7.5 hours LA that day and then on another day that week you should have 0.5 hours LA so that you have a total 8 hours LA and should have 32 hours worked..."⁴

Konstant responded at 4:18, "It should be correct now. Sorry, I'm in a fog today with a headcold."

16. In her November 1, 2010 investigatory interview, Konstant stated that she "totally zoned" that she had flexed her time during the furlough week, and that by the time she had filled out her timesheet, she had "forgotten," and "was in a hurry to complete" her timesheet, and that Wickham "reminded me of the error and I corrected it." In her December 6 pre-disciplinary interview, Konstant contended that Wickham's direction was contrary to DAS directives. Konstant also reported that Wickham had sent an e-mail during Wickham's furlough leave and had failed to report it on her timesheet, which Konstant believed raised issues of unequal treatment.⁵ At hearing, Konstant documented an instance in November 2010 where Wickham had written work hours for three days on the line for projected hours instead of three lines below on the line for hours actually worked. Konstant's staff corrected those entries.⁶

(2) Permanent Finance Plan for Agency Re-Class Package

17. In August 2010, Konstant was asked to complete a document called a permanent finance plan to reclassify a Department Fiscal Auditor position downward to Accounting Technician 3. Konstant estimated that she had done a hundred such finance packages during the last twenty years of her employment. The first plan she developed

⁴In her post-hearing brief, Konstant notes, correctly, that state rules prohibited her from taking previously unscheduled furlough time without the permission of her supervisor, and that this e-mail exchange was the first time she was granted that permission. Konstant's original e-mail reporting her hours during the week in question did not identify any replacement furlough time, and Wickham approved Konstant's leaving work to keep her working hours at 32 for the week without mentioning replacement furlough time.

⁵Part of Konstant's job was to oversee Department timesheets. After Konstant raised the issue, Wickham amended her own timesheet, receiving a credit of vacation time and an oral warning.

⁶At hearing, Konstant argued that her second timesheet was correct because state rules require furloughs to be *scheduled* in eight hour blocks. This argument ignores the issue of how Konstant's *actual* work time on the previously scheduled furlough day should be reported on a timesheet.

abolished the position only prospectively.⁷ Wickham e-mailed Konstant to state, “When we abolish a position we need to show the entire 24 months at the top step. Please make the correction and resubmit.” Konstant then revised the plan to abolish the position entirely and sent the plan to DAS. However, the corrected plan Konstant sent to DAS had other errors, and Konstant had to redo the plan to correct this.⁸

18. During the November 1, 2010 investigatory meeting, Konstant stated that “someone” at DAS or the Department told her to abolish only the amount of the position required to fund the reclassification. Konstant repeated that explanation at hearing. The Department did not provide any evidence containing regulations, rules, or circulated memoranda on the subject.

(3) Financial Year-End Report/Sub Recipient Report

19. On August 27, 2010, Konstant submitted the Department year-end financial report to DAS Statewide Accounting & Reporting Services (SARS) Analyst Jeanne Bock. In an e-mail to Bock and Wickham, Konstant identified an anomaly in the report:

“There did not seem to be a separate subrecipient⁹ report this year, as in the past and in the year-end-closing guide. Let me know if we are missing

⁷Konstant contended at the time that it was unclear whether the Department could appropriately seek to abolish position authority that it had already used, an explanation Konstant repeated at hearing. At hearing, Wickham declared that Konstant was “simply wrong” without further explanation or citation. Without such an explanation or authority, we decline to resolve this dispute.

⁸The Department notes correctly that, at hearing, Konstant sought to downplay the significance of her error by testifying that Exhibit P-20, a version of the reclassification plan which Konstant had corrected to abolish the position for the entire 24 months, was the first version that went to DAS, and that Exhibit P-19, a prior version of the plan which only abolished the position for three months, was never sent to DAS. The Department argues that Konstant’s statement was “demonstrably not true” and “patently false.” (Department post-hearing brief at 7.) The Department points to e-mails between Konstant and DAS about Konstant’s corrections to the form. However, based on the evidence in the record, we conclude that those e-mails refer to the *other* errors in the form, not the 24-month issue, and that Exhibit P-19 was never sent to DAS, as Konstant testified.

⁹A subrecipient is a non-federal entity that expends federal awards received from a pass-through entity to carry out a federal program. It does not include an individual who is a beneficiary of such a program. It also excludes vendors that receive federal funds in exchange for goods and/or services in the course of normal trade or commerce. (<http://www.ofm.wa.gov/policy/glossary.asp#s>)

anything. The brio query file includes everything (all reports available) in the one file. Also attached is the excel spreadsheet of corrections to the SEFA¹⁰ report.

“Let me know If you need more!”

20. Seventeen minutes later, Bock replied that because Konstant’s expenditure report identified amounts passed through to “sub-recipients,” there should be a subrecipient report that matched those amounts on the expenditure report, and gave Konstant instructions on how to locate the needed data through the Department’s electronic recordkeeping software. On August 30, 2010, Bock e-mailed Konstant her final comments on the report. Bock asked Konstant to review the Oregon Accounting Manual provisions on recording expenditures so they would be reported correctly, and stated that DAS had directed the Department to make the same correction the prior year.

21. Konstant followed up on that direction in an e-mail to her subordinates and other Department managers that same day:

“**Subject:** Coding for Grant Subrecipients

“FYI;

“There are two object codes set up that need to be used for any payments going out to federal grant subrecipients (such as NHAC pass throughs, etc.) These object codes are:

“6730 - Grant Distribution to Subrecipients

“6740 - Grant Distribution to Non-taxable Subrecipients

“Upon investigation, I found that these codes were not included in all of the various versions of our object codes listings.

“Fiscal is working to update all list[s] to ensure these codes are included. I will let you know when this is complete so that you can pull a new, improved listing. In the meantime, if you are passing grant funds through to sub-recipients please choose one of the codes above, as appropriate.

“As always, if you would like guidance on when to use a particular code, I would be glad to help.”

¹⁰SEFA apparently stands for Schedule of Expenditures of Federal Awards.

A few minutes later, one of Konstant's subordinates e-mailed the recipients of Konstant's "FYI" e-mail to state that the list had been updated to include the missing codes.

22. At the December 6, 2010 pre-dismissal meeting, Konstant stated that the problem had been caused by Department managers using the wrong code numbers for the subrecipient transactions, and that "this has been a chronic problem." Asked who in the Fiscal Section reviewed these payments for accuracy, Konstant stated, "I review all of the batches and try to catch them, these slipped through." Also at that meeting, Konstant presented a report dated December 3 that still used the incorrect codes. Konstant had requested a copy of the report for the meeting but did not notice that her employee had used numbers from the wrong list.

(4) September Reduction Form

23. On August 31, 2010, the DAS Budget and Management Division (DAS BAM) informed the Department that it was required to submit a "September Reduction form:"

"Last week the Office of Economic Analysis released the September 2010 revenue forecast that projects a drop in resources for 2009-11 that puts the state General Fund budget back out of balance. The Governor and Legislative Leadership have worked through a plan to address this shortfall that begins with the Governor directing DAS to use its administrative authority to reduce General Fund budgets across the board by \$377.5 million. A temporary administrative rule is being prepared that will implement these allotment reductions.

"As before, under ORS 291.261, the allotment reductions must be implemented equally across General Fund appropriations. We will not, however, reduce moneys allotted for the payment of debt obligations incurred by the state. In order to implement the allotment rule, each agency appropriation will be reduced by another 3.0 percent on top of the 4.6 percent reduction that occurred in June. The attached document displays each agency's allotment reductions for June 2010, and the additional allotment reductions for September 2010.

"In order to provide the Governor and Legislature with the best information possible, each agency needs to prepare a reduction plan to meet the reduction target for each appropriation. Please use the same form that was submitted for the June 2010 allotment reduction plan. BAM and LFO want the new reductions added to the June 2010 form so there is one document with all of the allotment reductions in one place. *Please place a line on the form to separate the June and September allotment reductions.*

“Your reduction plan for the \$377.5 million deficit is due to your assigned BAM and LFO analysts by close of business Tuesday, September 14, 2010. BAM will post the information to its website by Thursday September 16, 2010.

“Finally, once the reduction plans have been received by BAM, they will be reviewed with the Governor's Office. If there are concerns with the proposed plan, the Governor's Policy Advisor and the BAM analyst will contact your agency.” (Emphasis added.)

24. On August 31, 2010, Wickham forwarded this e-mail to Konstant with a comment stating “FYI. . . .requires action on your part!” After Konstant had software difficulties with the report form template, Wickham told Konstant to use the prior year’s electronic form and update the data.

25. Konstant did so and, on September 14, 2010, e-mailed the completed document to Solliday, stating: “Louise, here is the Sept GF Reduction Form that is due today. Let me know if it looks OK and I will get it over to Lisa.” The document did not have the line to separate June and September allotment reductions as directed by the DAS BAM e-mail because Konstant had either not noticed that direction or had forgotten it.¹¹ Solliday’s role, however, was to review the form for the accuracy of the financial information, not the format of the form. Solliday did not notice the omitted line and e-mailed Konstant stating “[I]ooks fine to me.”

26. On September 14, 2010, Konstant then e-mailed the document to DAS BAM. Only 37 minutes later, DAS Budget and Management Analyst Lisa Pearson sent Konstant and Wickham an e-mail stating, “Shouldn't this have a line between the two entries to comply with the instructions? Thanks.” Konstant corrected the form to add the line, and 33 minutes after Pearson’s e-mail, Konstant e-mailed Pearson the corrected version.

27. During the November 1, 2010 investigatory interview, Konstant stated

“I was trying to be quick. I recently realized that I am trying to get things done to fast. Just in the past few weeks I decided that I couldn’t continue to get things out so quickly/timely. I realize I need to slow down so I don’t miss instructions. I had this form completed and missed the new instructions.”

¹¹At her pre-dismissal hearing, Konstant stated that the direction was “just one sentence at the end of the long e-mail.” We do not agree with that characterization, but do find that the direction was not provided in a manner calculated to stand out.

28. Following up on her November 1 investigatory interview, on November 2 Konstant e-mailed Wickham to note that the report was submitted to Solliday, and that Solliday's response constituted Solliday's "APPROVAL of the document and its contents as written."

(5) American Recovery and Reinvestment Act of 2009 (ARRA) Quarterly Report

29. Konstant was responsible for completing and filing the Department's ARRA Quarterly report in the State ORSTATS computer data system. Konstant had performed this task before, and it normally takes only a few minutes to complete. The final, required step in that process was sending the Economic Recovery Executive Team (ERET) in the Governor's office an e-mail notice that the report had been filed. Konstant had provided that notification in the past. The notification was to be sent "[o]nce *all* data * * * for an award or awards is entered and ready for ERET's review * * *." The notification was required to be sent to a specific "Gov.ERET" e-mail address and contain specific information in the subject line and body. Konstant was aware of these requirements. She did not, however, know which individual would open the ERET confirmation e-mail.

30. On October 8, 2010, Konstant had computer difficulties entering the report into the ORSTAT program, and contacted the Governor's staff for assistance, speaking with Greg Goodenough. Goodenough referred her to Phil Harpster. Harpster had left the Governor's office to work at DAS, but continued to provide consulting assistance on the ORSTAT system. There is no evidence that Konstant was aware of Harpster's DAS employment status.

31. On October 8, 2010, Konstant contacted Harpster by e-mail about additional computer difficulties with the report. After it appeared that issue was resolved, at 12:36 p.m. that day Konstant e-mailed Harpster, stating "I think I finally got it in. At least it shows the September 30 report. This should be complete. If you need more, let me know."¹² She followed up with another e-mail at 12:46 p.m. stating,

¹²After the November 1, 2010 investigatory meeting, Konstant followed up with a November 2 e-mail to Wickham stating "I did indeed send an e-mail to the Governor's Team—specifically to Phil Harpster stating that it looked like September was in. This was done within the required deadline in spite of all the difficulties in getting the report entered." Konstant knew or should have known, however, that her "September was in" e-mail was not in fact at the end of the process nor did it meet the notification requirements.

"I couldn't get it to give me a new report to fill in so it ended up updating the prior quarter. I guess we still need to get it straightened out."¹³

32. Following this communication, Konstant, Harpster, Goodenough, and Mike Williams had a conference call. Harpster, Goodenough, or Williams agreed to duplicate identical data from the prior report to fill in the problem section and told Konstant she did not have to do anything more. In Konstant's view, Harpster and Goodenough entered the final data which finished the report. Konstant did not submit the separate required e-mail notification to ERET that the report had been filed.

33. Shortly before 3:00 p.m. on October 8, 2010, Williams called Wickham to tell her that ERET had not received the e-mail notification. He also told Wickham that there had been software problems with entering the report, and, we infer, that he had communicated with Konstant about those problems. The record does not explain why Williams called Wickham and not Konstant. At 3:03 p.m., Wickham e-mailed Konstant and told her that "the Gov ERET team" was still waiting for the e-mail notification, and included the designated e-mail address and subject line. At 3:35 p.m., Konstant responded "I personally talked with them about it. I will send an official email to follow up." Konstant then sent that e-mail.

34. At hearing, Konstant testified that, because the form instructions stated that the e-mail was to be entered "once all data for an award is entered," it was not appropriate for her to send the e-mail notification. Konstant testified that she did not enter all the data, that the data was entered by the Governor's office, and that she did not know when they entered that data. She did not make this argument when instructed to send the e-mail anyway, or in the investigatory or pre-disciplinary interviews, and we conclude that this was not the reason Konstant acted as she did. We conclude that it is more likely than not that Konstant simply dropped the matter once told the report would be finalized by the Governor's office without thinking about whether or not she needed to send the confirmation e-mail or take any other steps to make sure the process was completed.

(6) Accounts Receivable Generally

¹³The Department argues that Konstant's 12:36 p.m. e-mail proves that Konstant was lying when she contended that officials in the Governor's office took the final steps in entering the report's data and submitting the report. The Department ignores the e-mail Konstant sent only ten minutes later. We note that the Department has the burden of proof in this matter and could easily have introduced testimony from ERET officials, telephone records, or computer records to prove its position. On this record, we conclude that Konstant was generally accurate about these events, except as noted.

35. On October 11, 2010, at 11:12 a.m., Wickham e-mailed Konstant stating "I need the files regarding the Apperson funds, the two University funds, the Burbank Trust, and the OHSU Med-Dent loan program. Also, a copy of the report sent to LFO regarding accounts receivable for the most recent fiscal year end." At 11:17 a.m., Konstant replied:

"The LFO report is on line and we reported nothing to report as we have not tracked or recorded receivables for years. There is not a physical copy of it. As you know, we are working to identify and record receivables at the present time. I have just given instruction to Dennis today to start treating receivables as such and record them correctly. He didn't want to do so because 'we didn't catch them when the payment came in.' I told him that we were going to start recording them for what they are and treating them correctly.

"I will get the files."

36. Within a few minutes of her e-mail, Konstant visited Wickham's office. Konstant told Wickham that, according to Wickham's notes, "we did not ever record the OHSU Med-Dent loan as a receivable – that we (DSL) has never recorded any receivables. I questioned how DSL could have a nearly \$1.8 million loan out there [and] never have recorded it as a receivable she re-iterated that it was not on the books."

37. On October 11, 2010, at 11:44 a.m., Konstant e-mailed Wickham on the subject of "Med Dent." Konstant stated:

"Correction: This is recorded as receivable GL931 with small payments against it as money comes in. We have an additional \$300k GL950 recorded for Health Science University. We cannot tell when it was given to them or why it was given. There have been no payments on it."

38. At hearing, Konstant provided evidence of a lengthy history of attempting to change Department accounting and recordkeeping practices regarding the recording of certain transactions.

39. During the November 1, 2010 investigatory interview, Konstant was asked to explain her statements to Wickham. Konstant stated that she feels like she needs to respond right away, and that her section has a lot of confusion around accounts receivable. She said that she is not always involved in conversations with staff, so prevailing theory comes into play and it is not always correct. She stated that she needed to learn not to rush through things or make decisions based on the prevailing theory of the staff.

40. In the pre-disciplinary interview, Konstant stated, "I am being reprimanded for something I was never told to change."

(7) Recording of Land Sales Contracts

41. The Department is involved in two types of land sales and uses two relevant accounting systems. Land sales are either simple sales or sales over time based on a contract. The latter sales are very rare; the Department had only two of them during the events at issue here. The two accounting systems are a CASH system and SFMA. The CASH system is more detailed and specific but less amenable to generating reports; the SFMA system is less detailed but more amenable to generating reports.

42. On October 7, 2010, Konstant and her subordinate Dennis Lemon told Wickham that the Department employees "are not recording any land sales contracts as [accounts receivable] and the only way they ever know about them is if program staff ask for an amortization schedule." By program staff, Konstant apparently meant Department employees outside of her Section who handle the land transactions.

43. After that date, Wickham located an e-mail from Konstant on the subject of "Loans for Land Sale Transactions." In the e-mail, Konstant directs staff to code different elements of a specific land sale contract differently (Konstant referred to the loan application fee, loan principal, and loan interest). Konstant referred to these entries being made into the CASH system. Konstant made no reference to recording any of the loan or its proceeds as an account receivable. After this discovery, Wickham told Konstant, according to Wickham's notes, that "[a]lthough I agree that the LM folks have some responsibility in getting the docs to fiscal - Fiscal [Konstant] has a responsibility to follow up when she is aware of the intended action."

44. In a few minutes of investigation, Wickham located other documents regarding land sales that she believed should have made Konstant aware of the need to track some of them as account receivables as she received paperwork and posted cash receipt entries for large amounts of money related to land sales. Wickham believed Konstant should have followed up on these documents to ensure that at least the land sales contracts that Konstant knew about were categorized appropriately in the Department's accounting systems.

45. At the November 1, 2010 investigatory meeting, Konstant again stated that she had no way of knowing when or if contracts are ever done or sales completed. At hearing, Konstant explained the two accounting software systems of CASH and SFMA, as described above. She contended that her supervisors did not understand the relationship between those two accounting systems regarding land sales and land sale contracts. She testified credibly that although the Department handles many sales of

land, it handles very few such sales through a contract for payment over time, and that there were only two such contracts during the time at issue in this appeal.

(8) Forfeited Vehicles

46. Part of the Department's function is to receive property forfeited to the Department of Fish and Wildlife (DFW) because it was seized from individuals violating Fish and Wildlife laws. Much of the seized property are things such as guns and fishing gear. However, DFW also seizes vehicles, usually four-wheel drive vehicles, from time to time. After DFW transfers the forfeited property to the Department, the Fiscal Section sells it and transfers the proceeds to the Common School Fund.

47. In June 2009, the State Police transferred a forfeited Toyota 4Runner to the Department for sale. The Department Fiscal Section, under Konstant's authority, sold the vehicle on eBay and transferred the proceeds of the sale into the Common School Fund. Konstant had reviewed that transfer and concluded that it was permissible under ORS 475A.110(2)(b).

48. ORS 475A.110(2)(b) was repealed in 2009, but that repeal did not affect forfeiture proceedings already taking place, such as that of the 4Runner.

49. In September 2010, at a Fiscal Section staff meeting, Greg Goller, one of Konstant's subordinates, mentioned that he would be traveling to Medford or Grants Pass to pick up some vehicles. Konstant understood that Goller was going to get the vehicles from an estate. In fact, Goller picked up two vehicles from an estate but also received a Nissan Altima from the Oregon State Police (OSP). Goller picked up the vehicles on September 8, 2010.

50. Goller's travel expense form stated in a handwritten notation that the reason for the travel to Grants Pass was:

"X20 - Maxwell - 2011-18 10244
"134 - Forfeitures 10243"

A second form, detailing towing expenditures, bears a handwritten notation by one person stating:

"Note which estate:
"what gas purchase was for
"Move from 10243 [estates administration] to 10244 [estate funds]"

Below that, a handwritten notation by another person states:

“\$134 was OSP forfeiture
“[unintelligible][towing charges]”

Between October 8 and 12, 2010, Konstant signed off on reimbursement for these expenses.

51. Konstant required Fiscal Staff to notify her before placing an item for sale on eBay. Goller knew of this requirement. However, Goller had occasionally posted vehicles on eBay without Konstant’s permission when she was unavailable. Goller believed that, because Konstant had approved a similar forfeited vehicle (the Toyota 4Runner) being listed on eBay in 2009, there should be no problem with the Department obtaining the Nissan Altima and selling it on eBay in 2010. Despite his knowledge of the correct procedure, Goller placed three vehicles on eBay to sell without informing Konstant.

52. On October 17, 2010, Wickham noticed three vehicles for sale on the Department’s eBay listing. On October 18, 2010, Wickham asked Konstant about the vehicles. Konstant, trusting that her staff would have informed her of any listings, responded that the Fiscal Section did not have any vehicles for sale on eBay.

53. Goller was not in the office on October 18, 2010. Konstant held a meeting with the rest of the Fiscal Staff that morning. After the meeting, Konstant told Wickham that her staff told her there are no vehicles for sale on eBay.¹⁴ Wickham showed Konstant the eBay listings and inquired about one of the vehicles, a Nissan Altima, listed as a forfeiture. Wickham asked Konstant how a passenger car could be a forfeiture under the wildlife violation laws. Konstant replied that there was a court order, so no statutory authority was necessary.¹⁵

¹⁴The Department suggests that Konstant was lying when she made that statement, stating “[the Department] later reviewed the staff meeting minutes for that day and found that staff had indeed discussed vehicles on Ebay at the meeting.” (Department post-hearing brief at 12.) The Department does not cite or quote those minutes. The two entries it apparently refers to state (a) “[Doe] Estate – * * * Will sell pick-up on e-bay,” and (b) “Cars on e-bay – will send links to [Fiscal Section Staff member] Liz.” The entries are consistent with Konstant’s statements, and the Department provided no witnesses from the meeting to contradict them.

¹⁵Konstant never provided an explanation for this inaccurate explanation.

54. On October 19, 2010, Wickham asked Konstant for a copy of the court order regarding the Altima. Konstant did not provide a court order, but instead gave Wickham a “Certificate of Sale of Seized or Abandoned Vehicle” from the Oregon State Police certifying impoundment and failure of the owners to reclaim the vehicle. The certificate cited ORS 475A.020(1). Konstant told Wickham they had a larger problem because Konstant had determined that statute was repealed and replaced with a new statute. Konstant also informed Wickham that Goller had not gotten her permission before posting the vehicles on eBay and that is why she did not know about the vehicles.¹⁶ She said if he had submitted the proper paperwork, she could have reviewed the problem statute before the Altima was put up for sale.

55. Konstant immediately tried to stop the Altima’s sale on eBay, but learned it was too late to do so. She then made arrangements for the proceeds to be sent directly to OSP without being handled by the Department.

56. In December 2010, Konstant sought the assistance of attorneys with the Department of Justice in interpreting the old and new forfeiture statutes. The attorneys were equivocal, but generally advised Konstant that the current statute did not authorize the Department to sell property forfeited through the OSP.¹⁷

¹⁶The Department argues that Konstant’s statement that she was unaware Goller had obtained a forfeited vehicle from the State Police “was proven false by Mr. Goller’s travel expense records, which [Konstant] reviewed, signed, and/or released into [the Department’s] accounting system on and before October 12, 2010. Those records included a travel expense detail and the accompanying vehicle tow records, both of which included notations about the forfeiture.” (Department post-hearing brief at 14.) We conclude that it is more likely that Konstant failed to notice, ascribe significance to, or remember the reference to OSP in Goller’s expense forms.

¹⁷Konstant and the Department agree that the new statute does not allow transfer of OSP forfeited vehicles to the Department. The Department argues, “[i]f [the Department] can not accept and dispose of forfeited vehicles under the new statute, it could not have done so under the old statute as the relevant statutory language is nearly identical in all pertinent respects. More importantly, however, these statutes address only the forfeiting agency’s authority to transfer property. Neither the old nor the new statute address [the Department’s] authority to receive and dispose of such property — which is the very issue on which [Konstant] was found lacking.” (Department post-hearing brief at 15-16.) However, the Department does not identify any Department regulations, rules, or circulated memoranda on the subject, and does not refer to specific statutes or regulations to explain the Department’s authority regarding OSP forfeitures. We decline to address the extent of the Department’s statutory forfeiture jurisdiction in the absence of substantive evidence, citation, or argument.

Disciplinary Process

57. On November 1, 2010, Wickham and Department Human Resource Manager Mylisa Holland held an investigatory meeting with Konstant. After the meeting, Konstant followed up with additional information about the issues addressed. On November 19, 2010, Wickham and Holland had another meeting with Konstant to discuss the impact of Konstant's additional information. On December 1, 2010, the Department issued a pre-disciplinary notice, and a pre-disciplinary meeting was held on December 6, 2010. The suspension was issued for January 3 through January 7, 2011, and Konstant had served that suspension as of the date of the hearing.

In the letter imposing the suspension, the Department stated in part:

"The position you hold must be able to provide accurate and verifiable information and meet numerous, often competing deadlines. The incumbent must understand statewide and agency policies and procedures and ensure that staff adhere to requirements specific to their duties.

"To be successful in the position you must initiate communication with your direct supervisor on issues where you are not clear on how to proceed. You must gather all the information and consult with appropriate parties to resolve issues and provide a course of action to your subordinates. It is critical that you communicate well you're [*sic*] your peers, executive team members, and outside parties to find resolutions in effectively leading the Fiscal and Estate sections.

"Your continued failure to proactively address the critical areas of performance deficiencies perpetuates a negative image of the accounting and estates sections' work products and creates an undue workload burden on executive team members, managers and external parties who must review and verify information.

"You have been in this position as the agency's Fiscal Manager since 2003. The agency has worked with you to help assist you in performing the duties assigned to your position. This is demonstrated by the past disciplinary action dated 3/31/2008; performance expectation memo dated 5/8/2009; performance appraisal marked with 'needs improvement' dated 5/19/2009; progress review memo dated 11/23/2009; performance improvement memo dated 5/3/2009; second letter of reprimand dated 6/11/2010 and a work improvement plan dated 7/30/2010.

“Although you believe you have improved, your actions themselves do not show sufficient improvement in critical performance areas outlined in your work plan. You continue to fail to meet performance expectations and standards in knowledge, skills and level of independent decision-making that gives the agency a lack of confidence that you can successfully perform in your position. The individual errors taken alone are not grave, but the accumulative amount over the past several years continue to cause concerns to your attention to detail and your ability to follow directives. This has been demonstrated by a pattern of continued errors even where you have received instructions verbally and in writing. These errors and misinformation cause a lack of confidence in your ability to perform the duties of the position of Fiscal manager.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The Department did not violate ORS 240.570(3) when it suspended Konstant for one week without pay, effective January 3, 2011, for inability or unwillingness to fully and faithfully perform the duties of her position satisfactorily.

Standards for Decision

ORS 240.570(3) provides that, after completion of trial service,

“the 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.”

In reviewing an appeal of such discipline, this Board must determine whether, under all the circumstances of the case, the Department's action is “objectively reasonable.” *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004); *Morisette v. Children's Services Division*, Case No. 1410 (March 1983).

This Board has stated that

“[a] ‘reasonable employer’ is one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross.

Smith v. Department of Transportation, Case No. MA-4-01 (June 2001); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989). In addition, a reasonable employer administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994).” *Bellish, supra*.

We review the allegations in turn. In doing so, we are mindful that this is an employee who had repeatedly received direction about, and had been reprimanded for, errors in her work.

Timesheet and Furlough Time

The Department failed to prove that Konstant acted wrongfully in submitting her timesheet record of her furlough time or in failing to correct it promptly. The initial timesheet Konstant submitted was in the standard form for exempt employees. Upon being directed to change it, she did, and the Department does not argue that the original timesheet should subject Konstant to discipline. The focus of the parties’ dispute is over how Konstant reported her actual furlough and work time on the second timesheet. Wickham’s direction to take the remaining furlough half-hour on another day when Konstant had already worked was equally inconsistent with the directions in the record; if anything, the additional furlough time should have been taken on Friday when Konstant performed no work. Based on the oral warning Wickham received for the same offense, it appears that the Department has enacted a zero tolerance policy regarding errors on timesheets. If that is the case, a reasonable employer announces the change prior to imposing discipline, which it did not do.

Permanent Finance Plan for Agency Re-Class Package

The Department failed to prove that Konstant violated any established rules, standards, or instructions regarding the retroactive abolition of a position. However, the Department proved that Konstant submitted a final product that, despite its multiple drafts, had other errors in the position codes. This type of inattention to detail is at variance with the duties of a Fiscal Manager and is similar to errors Konstant had made in the past which resulted in discipline.

Financial Year-End Report/Subrecipient Report

The Department proved that Konstant submitted this report to DAS knowing that it probably contained errors that had to be corrected. While Konstant said she submitted the report with a statement identifying a likely error, she had previously been

instructed to correct such errors before submitting reports. Konstant did not explain why she could not have contacted DAS officials about the subrecipient problem before submitting the report to them. Submitting a report to DAS that she knew was likely to contain errors was similar to actions Konstant had taken in the past which resulted in discipline.

September Reduction Form

While Konstant failed to add the line on the September Reduction form as directed, the Department has not established that this was a significant error. We have determined that the directions Konstant did not follow were relatively easy to overlook. It also appears that the error was small and easy to correct in minutes.

American Recovery and Reinvestment Act of 2009 (ARRA) Quarterly Report

It appears that Konstant was the victim of some miscommunication with the Governor's staff about her duties after they received the report. Nevertheless, there is no evidence that Konstant ever inquired about whether she had to file the e-mail certificate. She did ultimately file the certificate, but only after at least two other individuals had to expend their time and attention on the matter. Given Konstant's position and responsibility, it was her job to make sure that the certificate process was completed, and not to rely on a general assurance that she need do nothing more. Konstant's duty to follow up was enhanced, not diminished, by her knowledge that she did not enter the final data; the process remained her responsibility even if some of the work was performed by the Governor's staff. This type of inattention to detail is at variance with the duties of a Fiscal Manager and is similar to errors Konstant had made in the past which resulted in discipline.

Accounts Receivable Generally

The Department failed to prove that Konstant violated any accounting standards or Department rules regarding accounts receivable. However, Konstant had a responsibility to respond accurately as well as promptly to Wickham's questions. Konstant failed to do so when she told Wickham that the Department had no recorded accounts receivables when in fact it had two. Konstant's statements that she felt she needed to respond right away, that her Section has a lot of confusion around accounts receivable, and that she needed to learn not to rush through things or make decisions based on prevailing theory of staff are explanations but not defenses. Konstant's managers were entitled to answers that were not the inaccurate products of rushing or confusion. This type inattention to detail is at variance with the duties of a Fiscal Manager and is similar to errors Konstant had made in the past which resulted in discipline.

Recording of Land Sales Contracts

In its brief, the Department argues that Konstant should have been aware of some Department land sales contracts—documents related to such contracts passed through her hands, and therefore Konstant’s statements that she did not know about land sales contracts unless told of them by Land Management staff were false. The Department failed to prove that Konstant violated any accounting standards or Department rules or directions in the manner in which she handled her responsibilities regarding land sales contracts. Konstant provided information about a lengthy history of efforts to improve Department performance in this area, which involved other sections besides her Fiscal Section. If the Department’s system for tracking land sales contracts was indeed as haphazard as both Konstant and the Department contend, it is difficult to understand why it was not a Department-wide priority to create a better system for keeping track of these sales. The Department has not established that Konstant’s conduct regarding this issue warranted discipline.

Forfeited Vehicles

Goller’s failure to advise Konstant that he was placing the vehicles on eBay, in violation of his instructions, is significant not only in mitigation of Konstant’s lack of knowledge of the sale, but also regarding the Department’s apparent lack of interest in disciplining him for this admittedly inappropriate action. We find the Department’s arguments that Konstant should have known that a State Police criminal forfeiture was at issue from Goller’s expense reports rather thin, since the information was cryptic. It is apparent that Konstant did not learn about the forfeited Altima from those documents, because Konstant made notations on some of the documents instructing Goller to put estate coding on them. Once Konstant learned that the vehicles were forfeited from the State Police and that the statutory authority she relied on had been changed, she aggressively sought to mitigate that damage.

The Department argues that the ultimate issue is that Konstant did not understand the statutory authority for the Department to receive property. We might be inclined to support discipline for this lack of understanding, except that the Department presented no evidence of Department regulations, rules, or circulated memoranda on the subject, or even a demonstration that Konstant’s superiors were able to explain the specific powers and limits of the Department regarding the receipt of property. Even in its brief, the Department does not provide a legal rationale for that authority.

More troubling is Konstant’s statement to Wickham that Konstant had a judicial order authorizing the Altima’s sale when no such document existed. In context, it appeared to be an attempt to fend off further inquiry by Wickham instead of performing her own due diligence and investigating the matter. This is another example of

Konstant's difficulties in failing to provide accurate information to her supervisors when asked. This type of inattention to detail is at variance with the duties of a Fiscal Manager and is similar to errors Konstant had made in the past which resulted in discipline.

Conclusion

We have determined that Konstant submitted a Permanent Finance Plan for an Agency Re-Class Package that had significant errors, and submitted an erroneous Financial Year-End Report/Subrecipient Report which she knew was likely to contain errors. We have determined that Konstant failed to follow up on the filing of the ARRA Quarterly Report to make sure the necessary certificate was filed. We have also determined that Konstant gave inaccurate statements to her supervisor out of haste and ignorance regarding accounts receivable and forfeited vehicles. Some of the errors identified by the Department are minor and unique. Others, however, are examples of Konstant's multiple failures to submit accurate information and reports to her supervisors and DAS officials when accuracy was important, and when she had been repeatedly warned and reprimanded regarding her lack of accuracy. Viewing Konstant's actions above in toto, against the background of her previous direction and reprimands, we conclude that an objectively reasonable employer could have issued a one-week suspension under these circumstances. We will dismiss the appeal.

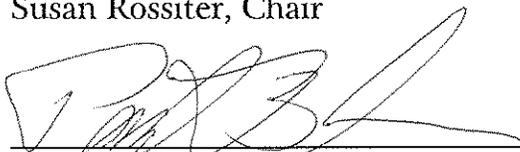
ORDER

The appeal is dismissed.

DATED this 31 day of May 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.