

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-23-03

(MANAGEMENT SERVICE DEMOTION)

MICHAEL R. BELLISH, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF OREGON, )  
 DEPARTMENT OF HUMAN SERVICES, )  
 SENIORS AND PEOPLE WITH DISABILITIES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RULINGS,  
 FINDINGS OF FACT,  
 CONCLUSIONS OF LAW,  
 AND ORDER

The Board heard oral argument on April 1, 2004, on Appellant's objections to a recommended order issued by Administrative Law Judge (ALJ) Vickie Cowan on January 30, 2004, following a hearing on November 4, 2003, in Salem, Oregon. The hearing closed on December 10, 2003, upon receipt of the parties' post-hearing briefs.

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Appellant.

Josephine Hawthorne, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

Effective July 1, 2003, the Department of Human Services, Seniors and People with Disabilities (SPD or Department), demoted Appellant Michael Bellish from his principal executive manager (PEM)-D position located in Hillsboro to a PEM-B position in Salem. Bellish timely appealed his demotion on July 9, 2004, and waived his right to have a hearing within 30 days.

At hearing, the Department withdrew 9 of the 12 charges against Appellant. The Department relies upon charges A-1, A-2, and C-2 to support its actions.

The issue presented for hearing is: Did the Department demote Appellant in violation of ORS 240.570(3)?

### RULINGS

The ALJ's rulings were reviewed and are correct.

### FINDINGS OF FACT

1. Bellish has been employed by the Department since July 1988. At the time of his demotion, Bellish was the program manager for certain State-funded programs for senior citizens administered through the Area Agency on Aging Type B Contract offices of the Washington County Department of Aging and Veterans Services (WCDAVS).

2. By statute, counties have the option of administering certain State programs for seniors. Washington County exercised that option.

3. Mary Lou Ritter is the Director of the WCDAVS. Ritter is a Washington County employee and Bellish's direct supervisor.

4. Bellish was the highest ranking supervisory and managerial employee for the State in Washington County. His responsibilities included supervising two supervisors who, in turn, supervised approximately 37 employees. Bellish managed certain State-funded programs within Washington County including Food Stamps, Title XIX (Medicaid), and the Oregon Health Plan.

5. Adult Protective Services (APS) is a State program responsible for investigating complaints of abused and neglected senior citizens. Employees who investigate these complaints are State employees and are supervised by Ritter, a county employee. Bellish has no supervisory or program responsibility for APS.

6. Oregon Project Independence (OPI) is a State-funded program administered by Washington County. OPI provides services to seniors and disabled persons so that they may remain in their own homes. Washington County employees operate OPI. Bellish has no program or supervisory responsibility for the OPI program.

7. The Department has a computer system called ACCESS on which client records for both APS and OPI are maintained. Client records contain the case

manager's contacts with a client's family and other persons with whom the client has a personal relationship, case manager narratives of contacts with the client, incidents relating to the client, and the services provided. All client records are confidential and maintained solely for the use of State and county employees providing services to the client.

8. The Department has an Ethics/Conflict of Interest policy which provides guidance and direction for employees in their official capacity. The policy addresses issues that arise when a person with whom the employee has a personal or family relationship becomes a client of the Department. The policy provides, in relevant part:

"FAMILY/RELATIVES: Includes parents by blood, marriage or adoption, parents-in-law, spouse, any child or stepchild, sons-in-law, daughters-in-law, brothers, sisters, brothers-in-law, sisters-in-law, nieces and nephews.

"\* \* \* \* \*

"PERSONAL RELATIONSHIP: Any relationship of a non-business nature which would place the employee in a position to intrude upon or influence a client's relationship with SDSD [SPD]. Some examples of potential intrusions are: taking charge of a client's financial affairs, acting as a caseworker for a relative or friend, landlord/tenant.

"POTENTIAL CONFLICT OF INTEREST: Any transaction where a person acting in the capacity of an SDSD [SPD] employee, takes any action or makes any decision or recommendation, the effect of which would be to the employee's and/or employees, (*sic*) relatives financial benefit.

"\* \* \* \* \*

"EMPLOYEES OF THE DIVISION ACTING IN AN OFFICIAL CAPACITY SHALL NOT:

"\* \* \* \* \*

"10. Access confidential case record information in SDSD [SPD] or other state agency of a client with whom the employee has a personal or family relationship.

“\* \* \* \* \*

“EXISTING RELATIONSHIPS: Any employee who is placed in a position of working with a client with whom the employee has or has in the past had a personal or family relationship shall notify their supervisor immediately of the circumstance \* \* \*

“REQUESTS FOR CLIENT CASE TRANSFER TO ALTERNATE WORKER: Employees will request relief of a case due to personal or family relationship with a client who has been assigned to the employee’s caseload by making a written request to the immediate supervisor. The immediate supervisor will, upon receipt of such a request, reassign the case to another employee if such an assignment is possible within the configuration of the branch. If the case cannot be reassigned to another worker because there is not a worker available who does not have a personal relationship with a client (such as in a small rural branch), the supervisor will assign the case with the manager’s concurrence and will review the case on a monthly basis.”

9. In the mid-1990s, at the request of family, Bellish agreed to assist a distant elderly relative, M.<sup>1</sup> M is approximately 90 years old. She is a widow and has a grandson who lived with her intermittently. The grandson has often exploited her financially and abused her physically.

10. In July 1997, Bellish obtained a power of attorney (POA) for M’s financial affairs. Bellish informed Ritter of this fact. He assisted the family and M in disposing of M’s real property and in purchasing a condominium for her in Hillsboro. Bellish occasionally helped M with her shopping and other activities.

11. Between 1997 and 2000, M was the subject of several APS complaints alleging abuse or neglect by her grandson. APS caseworkers worked with OPI county employees to provide M with needed services. Bellish apprised Ritter of M’s ongoing problems.

12. On April 28, 1998, Gil Pena, an APS case manager, contacted Bellish at work via e-mail. Pena sought information from Bellish about M’s situation and any

---

<sup>1</sup>M was Appellant’s paternal grandmother’s half-brother’s wife.

information which would familiarize Pena with M. Bellish did not supervise Pena directly or indirectly.

13. On April 29, 1998, Bellish responded to Pena's inquiry and provided information about M's current situation.

14. Pena responded to Bellish's e-mail on April 29, 1998, stating "My mission is to determine what, if anything, I need to do with this open case which I inherited. What are your suggestions?"

15. Bellish responded to Pena's e-mail and stated:

"My recommendation would be that if it is an 'open' case and has not been recorded as 'Closed' for case tracking purposes, I would close and count it.

"At the same time, I would retain the file for an eventual need to re-open it as a 'new' case.

"Likewise, I would anticipate receiving occasional calls from various previous contacts (perhaps from contacts that Julie had). These contacts would be included in the narrative. With each addition to the narrative, I would include a decision to either open or not.

"[M] has a broad network of contacts and has repeatedly demonstrated the ability to activate these contacts. One of the difficulties is that she uses so many contacts so inconsistently [*sic*], that there is no one who is aware of all of them or how they are being used. This is a possible value you can add to her situation. An example is that I was unaware of Ms. [B] and do not know what her connection is with [M]. Everytime I talk or work with [M], or work with another relative regarding her, it seems like there is another person that is 'working' with her and possibly exploiting her.

"My obtaining POA on her behalf was more focused at mitigating the possibility (probability) of her G-son obtaining POA and exploiting her further. This way, she knows that she has assigned that to me and it is consistent with her husband's desire for the estate prior to his death. I am the designated 'Administrator' of their estate, should the one

spouse predecease the other. Likewise, I receive no gain from their estates.

“Thanks for your assistance!” (Emphasis omitted.)

Bellish’s suggestions conformed with standard practices for case processing.

16. In March 2002, Bellish’s son and his son’s girlfriend moved into M’s condominium to assist in her care. Bellish served as a contact person for social service agencies on matters relating to M.

17. On or about March 24, 2002, M was visiting her grandson in his home. While accompanied by the grandson’s girlfriend, M fell in a grocery store parking lot and fractured her hip. At the time of her accident, M had been receiving in-home services from OPI. Because she was hospitalized as a result of her injury, M would not need OPI services for an extended period of time.

18. On March 25, 2002, after Bellish found out about M’s situation, he accessed the OPI computer records and added the following:

“A/R fell while with G-Son on Sunday night fracturing her hip. A&G [Adams and Gray] and Hillsboro SC [senior center] contacted to discontinue services, at least temporarily.”

19. On April 25, 2002, a third party filed an APS complaint regarding M in which the reporter alleged that Bellish had abused or neglected M. The Department investigated the allegations.

20. After the Department finished its investigation of the abuse/neglect allegations, Human Resources investigated the personnel aspects of Bellish’s conduct. Effective July 1, 2003, the Department demoted Appellant to a PEM-B.

21. The Department based its demotion action on 12 charges. Nine of those charges were withdrawn. The Department relies on the following charges to support its decision to demote Bellish:

“A. Failure to Separate your Employment Role from your Role as RP

"1. In an April 29, 1998 e-mail you gave employee Gil Pena directions and recommendations on the client case record for [M] who is your relative. This employee was in a subordinate position to the management position you hold in the reporting structure. In part the e-mail stated 'My recommendation would be that if it is an "open case" and has not been recorded as "closed" for case tracking purposes, I would close and count it. At the same time, I would retain the file for an eventual need to reopen it as a "new" case. Likewise, I would anticipate receiving occasional calls from various previous contacts (perhaps from contact that Julie had). These contacts would be included in the narrative. With each addition to the narrative, I would include a decision to either reopen or not...' A family member or responsible party would not direct case management in this manner.

"2. On March 25, 2002 you made a case entry directly in [M]'s OPI case file. A family member or responsible party would not make an entry in a case file. Additionally, as a state manager, you have no responsibility for the OPI program as it is county administered.

"\* \* \* \* \*

"C. Failure to Provide Accurate Information

"\* \* \* \* \*

"2. The 3/25/02 entry you made in [M]'s OPI case file was not accurate. You narrated in the file that 'A/R fell while with G-Son on Sunday night fracturing her hip. A&G and Hillsboro SC contacted to discontinue services, at least temporarily.' In a taped interview on March 6, 2003, you stated that [M] was with her grandson's girlfriend. When asked about the discrepancy, you explained that you thought it better not to introduce a new name to the caseworker, so you changed the name of the person."

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Department violated ORS 240.570(3) when it demoted Appellant.

The Department demoted Bellish based on 12 charges. At hearing, nine of these charges were withdrawn. The Department bases its determination on two incidents; one occurring over five years ago and the second occurring more than a year prior to the demotion.

The facts in this case are not in dispute. In 1998, Bellish, in response to an e-mail from APS worker Pena requesting suggestions on how to handle M's case, gave him suggestions on how to process the case. In March 2002, Bellish accessed a county OPI file and noted that M was hospitalized as the result of fracturing her hip while with her grandson and would not need OPI services for an extended period of time. More than a year after discovering these two incidents, the Department demoted Bellish.

ORS 240.570(3) provides that a management service employee may be demoted if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. In deciding whether the Department's demotion of Bellish is consistent with the statute, we must determine whether, under all the circumstances of the case, the Department's action is "objectively reasonable." *Morisette v. Children's Services Division*, Case No. 1410 (March 1983).

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). When applying these standards to the facts of this case, we conclude that an objectively reasonable employer would not have demoted Bellish under these circumstances.

The first incident relied upon by the Department occurred in 1998. When asked by APS worker Pena for background on M, Bellish replied. Pena then asked for suggestions on how to process the case. Bellish replied with some suggestions. These suggestions complied with standard procedures for case processing.<sup>2</sup> Bellish was not M's caseworker. He did not supervise Pena either directly or indirectly, nor did he have program authority over APS. There was no evidence that Bellish's suggestions were inaccurate, that his suggestions in any way intimidated or threatened Pena, or even that Pena followed Bellish's suggestions. Neither Bellish nor M received any benefit from Bellish's suggestions. There is nothing in the Department's Conflict of Interest policy which prohibits Bellish's conduct. Even if it did prohibit Bellish's conduct, it occurred more than five years ago and was not repeated. In addition, the Department discovered the incident more than a year prior to taking disciplinary action. In *Civil Rights Div. v Williams*, Case No. 348 (December 1975), *remanded* 28 Or App 651, 560 P2d 673, *aff'd* 280 Or 595, 573 P2d 270 (1977), we noted that the appellant was not disciplined until months after the employer discovered his objectionable conduct. We found that the employer acted arbitrarily in disciplining the employee and found the discipline particularly unreasonable in light of the fact that the employee had not repeated the improper conduct. We conclude the same here. This charge will be dismissed.

The second incident occurred in March 2002, more than a year prior to the demotion. As a result of M's injury and subsequent hospitalization, he made an entry in the OPI file indicating that M would not need services for an extended period of time. That entry provided that M fell while with her grandson. The Department contends that Bellish was untruthful in this report because M was actually accompanied by grandson's girlfriend. We think the Department is nit-picking. The facts are that M was visiting with her grandson, and while in the grocery store parking lot with grandson's girlfriend, she fell and injured herself. Bellish's brief note, although not including every single detail, was sufficient to put OPI on notice that M was hospitalized and would not need services for an extended period of time. There was no allegation that this incident was anything other than an accident.

The Department contends that Bellish's notation in the OPI file violated its Conflict of Interest policy. However, a literal review of the policy proves otherwise. The policy prohibits an employee, in their official capacity, from accessing confidential case record information in SPD or other *State* agency files of a client with whom the employee has a personal or family relationship. OPI is not a State agency. It is a county agency. Although Bellish did not violate the policy literally, it can be argued that he violated the policy in spirit. Bellish had a personal relationship with M. He accessed her

---

<sup>2</sup>Bellish's comments came from his knowledge and experience of case processing. We conclude that another supervisor unfamiliar with M would have provided the same suggestions.

file to make the notation. There was no evidence that he did more than merely make the notation so that OPI would not needlessly pay benefits to M. Perhaps he could have made a wiser choice and contacted OPI directly so that a caseworker could put the same information in the same file. The end result would have been the same, but would have been less suspect. However, even if Bellish did violate the spirit of the policy, the Department knew of the violation more than a year before it took disciplinary action. A reasonable employer dispenses discipline in a timely manner. (*See Flowers, supra*) The Department was untimely in its discipline of Bellish

In addition, Bellish is a long-term employee with no prior disciplinary record. Taking this factor into consideration as well, we conclude that the Department did not act as a reasonable employer when it demoted Bellish. The demotion will be set aside.

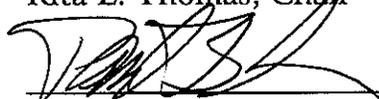
ORDER

Bellish's demotion is set aside. The Department shall immediately reinstate Bellish to the position in Hillsboro from which he was demoted.<sup>3</sup> The Department shall make Bellish whole for all lost wages and benefits, including reimbursement at the current IRS mileage rate for all additional miles he was required to commute between his home and Salem because of the illegal demotion.

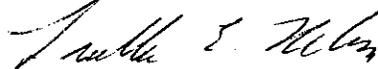
DATED this 1<sup>st</sup> day of April 2004.



\_\_\_\_\_  
Rita E. Thomas, Chair



\_\_\_\_\_  
Paul B. Gamson, Board Member



\_\_\_\_\_  
Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>3</sup>After Bellish's demotion, his position was reclassified to a PEM-E. Bellish formerly served as the highest ranking supervisor and manager for the Department in Washington County. We find no evidence that Bellish's position was in the process of being reclassified prior to his demotion. The position was reclassified sometime after Bellish filed this appeal requesting to return to his position.