

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-60-09

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES)	
ASSOCIATION,)	
)	RULINGS,
Complainant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
v.)	AND ORDER
)	
NORTH MARION SCHOOL)	
DISTRICT 15,)	
)	
Respondent.)	

On June 1, 2011, this Board heard oral argument on Complainant's objections to a Recommended Order issued on April 18, 2011, by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on April 5 and 6, 2010, in Salem, Oregon. The record closed on June 1, 2010, with the submission of the parties' post-hearing briefs.

Michael J. Tedesco, Tedesco Law Group, Lake Oswego, Oregon, represented Complainant Oregon School Employees Association.

Kelly D. Noor, Garrett Hemann Robertson P.C., Salem, Oregon, represented Respondent North Marion School District 15.

On November 23, 2009, the Oregon School Employees Association (Union) filed this unfair labor practice complaint alleging that the North Marion School District 15 (District) engaged in an unfair labor practice by dismissing Union bargaining unit member Julie Lemon from her employment with the District without just cause in violation of a collective bargaining agreement. Respondent filed its timely answer on March 17, 2010.

The issue in this case is:

Did the District violate ORS 243.672(1)(g) when it dismissed Julie Lemon from her employment with the District for allegedly violating the District's computer practices, and without just cause?

RULINGS

1. At hearing, the Union objected to the introduction of evidence regarding the District investigation of the conduct of Lemon's supervisor, Heidi Hermansen. The ALJ properly admitted this evidence. The alleged acts of Hermansen and Lemon were similar and factually connected, as were the District investigations of the two.

Accordingly, evidence concerning the Hermansen investigation is relevant to the facts upon which Lemon's discharge was based.

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

FINDINGS OF FACT

1. The District is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of District employees. Julie Lemon was a public employee of the District in the Union bargaining unit.

2. The Union and District were parties to a collective bargaining agreement in effect from August 2008 through June 30, 2010. Article 14 of the agreement, entitled Discipline and Dismissal, provided in part:

"14.1 Dismissal, suspension, demotion or other discipline of employees for unsatisfactory service shall be for just cause.

"* * * * *

"14.4 Dismissal. If a supervisor recommends dismissal of an employee, the Superintendent will review this recommendation and determine whether the employee should be dismissed. The Superintendent shall notify the employee in writing of his/her decision and the dismissal will be effective immediately.

“The employee shall be entitled to a hearing before the Board if a written request is filed with the Board within fifteen (15) days of the date of dismissal.

“Examples of actions for which an employee may be subject to dismissal include, but are not limited to:

- “• Failure to report for duty without a bona fide reason.
- “• Incompetence, inefficiency, or neglect of duty.
- “• Insubordination.
- “• Any willful violation of a rule or regulation established by the School Board or District administration.
- “• Conviction of a criminal act.
- “• Intoxication on duty.
- “• Conduct detrimental to the District or its personnel.
- “• Unauthorized absence.

“14.5 Suspension. In the event the District determines an employee has engaged in serious misconduct, the employee may be immediately suspended from duty, either with or without pay, by the Superintendent while the charges against the employee are investigated and a decision is made to continue or to discontinue that employee's employment.

“14.5.1 If the employee is suspended with pay and is subsequently cleared of any charges, the employee shall be immediately returned to work. There shall be no reference to the charges against the employee maintained in the employee's personnel file.

“If the employee is suspended with pay and is subsequently dismissed as a result of the District's investigation, the employee shall be dismissed effective immediately.

“14.5.2 If the employee is suspended without pay and is subsequently cleared of any charges, the employee shall be immediately returned to work and made whole for any wages or benefits lost as a result of the suspension. There shall be no reference to the charges against the employee maintained in the employee's personnel file.

“If the employee is suspended without pay and is subsequently dismissed as a result of the District's investigation, the effective date of the dismissal shall be the date on which the employee was suspended.

“14.5.3 Investigation of charges against suspended employees shall be concluded within a reasonable amount of time.”

3. In October 2006, the District hired Lemon, an intelligent, articulate, personable individual, as a substitute high school secretary. In February 2007, Lemon began job sharing a high school secretary position with Kelly Bowe. The job sharing arrangement meant Lemon and Bowe worked different days and times. Lemon took over the position full time in February 2008. Then-head secretary Renee Martinez and Bowe trained Lemon in her job duties and the use of the computer. In early 2008, a new desktop computer was placed at Lemon's desk.

4. A fundamental part of Lemon's job was to create, retrieve, modify, store, and maintain District documents on its computer system.

5. During the 2008-09 school year, Lemon's direct supervisor was then-Principal Glenn Elliott. Lemon's position provided clerical support for then-Athletic and Activities Director Heidi Hermansen and then-Vice Principal De Ann Jenness, however. Lemon and Hermansen were friends. Hermansen and Jenness did not get along.

6. Lemon's work desk was near the desk of then-head secretary Martinez, who did bookkeeping and assisted the District principals. Lemon and Martinez worked adjacent to the offices of Elliott, Jenness, Hermansen, and high school Registrar Colleen Young.

7. Linda Reeves was, and remains, the Superintendent of the District. Her office is located in the District middle school, a different building located near the high school.

8. The District uses personal computers on employees' desks which are connected to a network and network data storage drives. The system is set up so that individual employees keep their own file folder and directory system on the network G or H drives. This data is periodically backed up, permitting recovery of data for up to two months after deletion. The system is set up so that each District employee user, when seeking to save documents, will be given a default selection of a location on the G or H drive. Users may view and use material in the G or H drives placed there by other users.

The District has no written guidelines regarding how employees are expected to set up and organize their computer files. Each employee has discretion to set up a filing system that will allow the employee to readily find files.

9. The District's desk computers and laptops also have an internal disk drive, called the C drive. It is the practice for District employees to not use C drives to store District material, in part because these drives cannot be centrally backed up, cannot be viewed by other users, and periodically fail, particularly when started up after the summer break.¹

10. The District's computers have a "desktop" or main screen which displays folders for documents and shortcuts to various computer directories. The files which appear on the desktop are located on the computer's C drive.

11. In 2008, when Lemon started her job-sharing position with the District, District Technology Assistant Jill Kahle set up their desk computer so that Lemon and Bowe shared a folder on their desktop screen. That folder was located on her computer's C drive. Bowe and Lemon also had a file on the H drive. When Lemon took her position on a full-time basis in February 2008, she retained the desktop folder under her own name, and it was transferred to her new computer in August 2008. On Lemon's new computer, the default path for saving documents pursuant to the District's logon script was the H drive. Lemon's documents could only be saved to the C drive instead of the H drive if Lemon specifically chose the C drive.² Lemon did not use the G drive.

12. Lemon was aware of the difference between the C drive and the H drive, and knew that the G and H drives were backed up by the District computer system. Lemon knew that the District practice was to store her documents on the H drive.³

¹The desk personal computers require employees to log in with a password, and therefore a non-IT District employee cannot access the C drive of another employee, even a subordinate, unless they know the password.

²There was no specific testimony about software settings and defaults, but Kahle credibly and emphatically testified that she did not set up Lemon's computer to save documents anywhere but the H drive. Kahle always set up District computers so that the default path for saving documents was the H drive.

³Lemon testified that she did not know if the District backed up the C drive. Given Lemon's experience with the District computer system, we find it more likely than not that Lemon understood that the District had no regular system of backing up the C drives. This fact is not critical to our resolution of this case, however.

13. Lemon created folders and stored material in her directory on the H drive on some occasions. For example, as of February 2, 2009, she had stored a draft of the student handbook (file dated 1/29/09), a newsletter (9/11/08), a record of concession receipts from school athletic events (most recent entry 2/24/09), a folder regarding a school auction, and other school-related documents on the H drive. In addition, other District staff placed documents in Lemon's H drive directory for Lemon's use. However, Lemon stored the vast majority of her documents in a folder named "Julie" on her desktop's C drive throughout her full-time employment. For most of that time, that folder could be reached from Lemon's main computer screen by a shortcut labeled "Shortcut to Julie."⁴

14. Martinez occasionally retrieved files directly from Lemon's computer, which she found easy to do, because the "Julie" file contained subfolders such as athletics, dances, or other extracurricular activities, and school secretary forms.

15. Lemon received computer training informally from her co-workers, but not from District IT staff. The District maintained reference documents for its employees to view in a virtual location called the Portal. These documents included instructions regarding how District computer files and documents should be maintained, and whether, and how to, back up documents and files.⁵

16. During March or April 2009, Jenness learned that she had been selected to replace high school Principal Elliott, who was retiring.

17. On May 11, 2009, Lori Wells, the District's IT network coordinator, sent the following e-mail to all District staff:

⁴Lemon stated in the August 12, 2009 investigative meeting that she routinely saved documents to her H drive. At this hearing, the District's Network Coordinator, Lori Wells, testified that District computer records revealed that Lemon had not, in fact, made extensive use of the H drive. Lemon testified that she realized for the first time, after hearing Wells' testimony in this hearing, that she (Lemon) had, throughout her employment, erroneously believed that she was saving material to the H drive when in fact she was saving material to her desk computer's C drive. Lemon's testimony on this issue is not credible. In her prior statements, Lemon demonstrated a detailed understanding regarding use of the various drives and her handling of the documents at issue in this case. The evidence also shows that Lemon used both the H and C drives to save documents in the past. We also conclude that it is extremely unlikely that a person in Lemon's position for three school years could be unaware of the differences between the C drive on her computer and the G and H drives on the District computer network.

⁵There is no evidence in the record that Lemon ever viewed documents on the Portal, or that she was ever directed to do so.

“The end of the school year is fast approaching. Take time now to delete email and items on your H drive that are not necessary. By starting now and doing a little bit each week check-out at the end of the year will be much faster for you.

“Things to delete or copy to CD pictures, videos, music files, old lesson plans, etc.

“You might also want to consider copying all your lesson plans to a CD so you will have them for future reference.”⁶

18. On May 15, 2009, Reeves informed Lemon that her position was subject to possible layoff due to budget cuts.

19. Between May 11 and June 10, Lemon backed up her District files to her own USB flash drive (flash drive),⁷ which she had purchased for this purpose, and then deleted unnecessary computer files from the system. Lemon did not delete many items. Although she was fairly certain she would be returning to work for the next school year, she could not be sure. She wanted anyone who might replace her to have access to her files. Lemon knew that she was supposed to put her files on the H drive to be backed up, but did not do so.

20. Between May 11 and June 10, in the course of attempting to back up her files onto the flash drive, Lemon inadvertently deleted, or believed she had deleted, all of her files. Ian Reynoso, a regular substitute teacher, was present in the office at the time, and came to Lemon’s aid. Reynoso restored, or located, Lemon’s files and put them in a folder on Lemon’s main desktop screen. Partly in jest, Reynoso named the folder “Do not delete me.”

⁶Wells did not provide employees with any guidelines regarding what materials should be deleted or copied; she expected that each employee would exercise individual discretion in making these decisions. Wells also considered that use of a flash drive was an acceptable method for backing up files.

⁷The parties used various terms for this portable data storage device. We will call it a flash drive. See <http://www.techterms.com/definition/flashdrive> (last viewed March 1, 2012). “Flash drives have many names — jump drives, thumb drives, pen drives, and USB keychain drives. Regardless of what you call them, they all refer to the same thing, which is a small data storage device that uses flash memory and has a built-in USB connection.”

21. During the 2008-2009 school year, the District decided to combine Hermansen's Athletic and Activities Director position with a Vice Principal position. Hermansen applied for the position. In May 2009, Hermansen learned that she was not selected for the new position. Hermansen, Lemon, and Martinez believed that Hermansen should have been selected and were upset. They also believed that Jenness, who was on the selection committee, was responsible for the failure to select Hermansen.

22. In June 2009, Elliot gave Lemon an evaluation rating her as "meets expectations" in all areas, including knowledge of work, compliance with policies, judgment, and operation and care of equipment.

23. Jenness was uncomfortable about the friendship and loyalty between Hermansen and Lemon. On June 2, 2009, Jenness sent Martinez a message on Martinez' Facebook account. Jenness stated,

"Did you talk to Julie [Lemon] about how she does or does not support me? The reason I am asking is because things are different. Just wondering no concerns!!! I am really worried about next year! I really need you."

24. Martinez responded to Jenness with a message Jenness believed was reassuring. On June 4, Jenness sent Martinez another Facebook message:

"I knew I was not welcomed and I did my job as my self which proved I could do the job and be respected by the job. Nothing like moving to a new job and knowing no one wanted me or afraid of the connection I had with the kids.

" * * * * *

"Next year is not going to be easy. But I feel we as a team, can do it. I also understand your feelings. I do not want you to leave.

" * * * * *

"I have worked hard, I had to prove myself to the hs staff. It was not easy but I think I did a good job and I deserve the position I will have next year. Some people don't think so but I do deserve the job because I am the best person for the job.

"I am over the issue with Heidi [Hermansen] and Julie [Lemon]. I need to move on because next year is extremely important to me and the HS. I truly hope you will be working for us and we as a team will be strong and tell the district that we are not the BLACK SHEEP of the district. ."

25. On June 10, 2009, Reeves sent Lemon a layoff notice effective the start of the 2009-2010 school year. The District had eliminated the position of another District secretary, Colleen Devlin, who had more seniority than Lemon, and Devlin would therefore move into Lemon's position.

26. Lemon and Martinez were very upset that Hermansen would be leaving the District. On June 10, 2009, Lemon stated to co-workers that it was "time to get rid of files" and "what would happen if I got rid of these files." Although high school Registrar Young had heard Lemon make similar remarks before, Young was concerned that Lemon might actually follow through on her threats.⁸

27. Later on June 10, Young reported Lemon's remarks to Assistant Principal Jenness to protect the school and whoever might come into the new position.⁹ In response, Jenness¹⁰ called IT network coordinator Wells into the office to back up the computers used by Lemon, Martinez, and Hermansen. That same day, Wells backed up the desk computer hard drives used by Lemon and Martinez, but Hermansen used a laptop which was not then available for Wells to back up.¹¹

28. On June 11, District officials asked Wells to determine whether any files of Hermansen, Lemon, or Martinez had been deleted. That same day, Wells reviewed the contents of the backed up G and H directories on the server. She did not review the C drives of Hermansen, Lemon, or Martinez because the District's practice was not to save documents to C drives.

⁸Young testified credibly that Lemon "had said previously that what would happen if I got rid of these files, but that was like months before, and honestly I didn't think that she would seriously do something like that." (Young Testimony at 102.) Contrary to the Association's argument, we specifically conclude that Lemon's remarks were *not* referring to the year-end file backup and deletion process, and that Young did not misunderstand Lemon. We reach this conclusion because of the relative credibility of the witnesses, the proximity to the disappearance of Hermansen's files, Lemon's manifest anger, Young's credible testimony that Lemon had made similar, but less vehement, statements before, and Martinez' credible testimony that Lemon had stated she wanted to destroy files.

⁹Young first spoke very briefly to Jenness about the matter in passing, because she believed the matter was urgent, and then amplified her remarks later the same day.

¹⁰At hearing, Superintendent Reeves testified that Jenness contacted her, and that Reeves contacted Wells. This testimony was contradicted by Jenness and Wells. Resolution of this conflicting testimony is not critical to our resolution of this case.

¹¹There is no evidence that, prior to August 5, Lemon was aware that the District had copied the C drive on her computer.

29. Wells concluded that the documents on Hermansen's H drive directory had been deleted on approximately June 2. Hermansen's deleted documents were not on Lemon's or Martinez' G or H drive directories. It did not appear that documents had been deleted from the Lemon and Martinez G and H directories, however.

30. Later on June 11, while Hermansen was at lunch, a District representative left a letter on Hermansen's desk notifying her of an investigation into file deletion. Hermansen was deeply offended by the letter, and charged into Jenness' office to loudly accuse her of instigating the investigation. Jenness denied the accusation. The letter, in part, instructed Hermansen to meet with District officials later that day so that the contents of her District laptop could be reviewed. At that meeting, where it was determined that the files in question were not on the laptop, Hermansen stated that Lemon had copies of all of the critical files. One of the documents most important to the District was the updated version of the District athletic handbook.¹²

31. Hermansen was put on paid leave while the investigation continued, and was, at some point, escorted off the grounds of the high school. Martinez and Lemon were aware that Hermansen was accused of deleting her work files, and were upset about Hermansen's treatment. High school registrar Young overheard Martinez wonder what would happen if she put the files back. Jenness saw Lemon and Martinez looking at files on a computer screen and comment that all they need to worry about was "Hank's" files. "Hank" was Hermansen's predecessor as Athletic Director.

32. Martinez and Lemon were upset by the District's treatment of Hermansen. Although Lemon made remarks about possibly deleting or destroying documents, Martinez believed these were statements made in anger and that Lemon did not mean what she said.

33. Also on June 11, after the events involving Hermansen, Lemon spoke with Devlin outside of her office at an outdoor employee break area on the school grounds. Lemon told Devlin, who was to replace either Martinez or Lemon, that Lemon's files were on her desktop. Devlin thought this was not a place where she would have put her files, but did not share this opinion with Lemon. Lemon thought she might not return to work for the District, and wanted Devlin to have access to any files if Devlin took over Lemon's job.

34. During the week of June 15, Devlin visited Lemon's workstation to train for her new responsibilities. She talked with Lemon and Martinez, who told her that Martinez was probably leaving and that she should train for Martinez' job, which Devlin

¹²An older version of this document appeared on the District website, although it is not clear whether Jenness, Reeves, or Lemon were aware of this.

did. Jenness, seeing Martinez training Devlin instead of Lemon, asked the reason and was told that Martinez was probably not returning. Jenness was aware, however, that Martinez had made similar comments at the end of previous school years, only to return.

35. Between April 7 and June 16, Lemon added more documents to her H drive directory.

36. Sometime between June 10, when Wells copied the C drive, and July 24, when Wells looked at the C drive again, Lemon's C drive folders were rearranged, renamed, and some of the files were moved. It is most likely that these changes were made between June 10 and June 25, Lemon's last day of work. The "do not delete me" folder was still there, but there was also a "Julie 2" folder which had some of the same data as the "Julie" folder, and some other folders had been renamed.

37. Jenness was uncomfortable about the friendship and loyalty between Hermansen, Lemon, and Martinez, especially given Hermansen's accusations against Jenness.

38. Between June 4 and June 19, Martinez 'de-friended' Jenness on Facebook. On June 19, Jenness e-mailed Martinez, "You took me off as a friend, why? What did I do to deserve that?" Martinez responded, but her response does not appear in the record. On June 20, Jenness e-mailed Martinez:

"Thanks for responding. * * *

"* * * * *

"It is too bad how things worked out. We could have made a great team in the office but feelings were hurt and trust was broken. Somethings can never be overlooked. * * *

"I guess there is nothing more I can say about the hurt feelings and the mistrust. I can't keep looking behind me and wonder who in the office is stabbing me in the back. Like I have said before, I need to keep moving forward."

39. Lemon's employment term for the 2008-09 school year ended on June 30, 2009. Lemon's last actual day of work was June 25, 2009. During June, Lemon performed her year-end tasks as in a normal year, including: setting up the registration packets according to grade level on the counter so they could be mailed the first day back to work in August; preparing a list of office supplies needed for the coming year; and filling out order forms for attendance slips and athletic forms to be ordered the first day back to work. Lemon set things up so the start of the school year would go smoothly, and so that Devlin would have everything needed to perform her job.

40. During June, Lemon and Martinez moved their desks and various filing cabinets because (1) Jenness planned to retain her current office when she became principal, and (2) Martinez anticipated leaving and her successor needed to use Martinez' computer because it had accounting software loaded on it. Lemon switched her desk with Martinez' and moved her computer along with it. Jenness, not knowing that Martinez' personal computer had special software on it, was puzzled that Lemon did not simply use Martinez' computer rather than swapping it with hers. Lemon's new desk had smaller file drawers, and Lemon had to distribute her physical files in more places. Lemon placed a paper copy, but not an electronic copy, of the revised student handbook in one of her desk drawers, but could not recall later whether it was in the drawers on the left or right of her desk.

41. On June 24, Lemon told Devlin her (Lemon's) password.¹³ Without that password, only the District IT staff, namely Wells and possibly Technology Assistant Kahle, could view and retrieve material from Lemon's C drive. Jenness did not have Lemon's password.

42. Before leaving, Lemon did not save her files to the G or H drives, did not change the title on her desktop folder from "Do not delete me" to her own name or a more descriptive title, did not tell Jenness or any District employee besides Devlin where the computer files were located, did not give anyone other than Devlin her password to enable them to view her files, and did not leave a written record at her desk or in an e-mail describing the location of the files.

43. Because District officials were aware that Martinez was not planning to return, Lemon and District officials expected Lemon to be recalled to work in the fall.

44. It is general District practice that a laid-off District support staff employee participate in a "check-out" interview with his or her supervisor. During such a meeting, it is customary for the laid-off employee to turn in items such as District keys. Lemon had a brief check-out meeting with Jenness; at the meeting, Jenness never asked Lemon for her District keys.¹⁴

¹³Lemon's disclosure of her password to Devlin further undercuts Lemon's claims that she was unaware that she was using the C drive.

¹⁴At hearing, Jenness testified that she did not recall whether or not she had a check-out meeting with Lemon. Reeves testified that Jenness told her that she had not had a check-out meeting with Lemon. Given Jenness' heightened awareness of Lemon's activities, we find that lack of recollection not credible, and credit Lemon's testimony on this issue.

45. Before leaving the office on June 25, Lemon gathered all of her personal possessions and put them in her "school bag," a bag she normally used to take items to and from home and work. She put the flash drive in the bag as well. When she got home, Lemon put her school bag, including the flash drive, in her closet. Lemon did not tell any other District employee what documents were stored on the flash drive, or that she was taking the flash drive home with her. Lemon did not expect to use the flash drive during the summer, and it remained in her closet for most of the summer.

46. The flash drive Lemon took home contained everything that Lemon believed was pertinent to her job. Lemon had no reason to believe that it was not the only backup of the documents on her C drive. There were approximately 800 pages of documents on the flash drive.¹⁵ Some of the documents on the flash drive were confidential or sensitive, including: 66 pages of student expulsion letters; 33 pages of student nominations for academic awards with names and grade point averages (GPA); 26 pages of student sports forms with physicals, payment, and GPA information; the password and access information for the District Schedulestar database; 15 pages of attendance information; 152 pages of locker combination information; a 1-page list of students in Summer Academy; 27 pages listing student vehicles and information; 6 pages listing failing students (the "F list"); 6 pages of student attendance information intended for parents; 4 pages of names and addresses of students that may or may not have been authorized as directory information; and 1 page of student information regarding money students owed to the school.¹⁶

47. Lemon did not advise the District that she had taken home a copy of all of the files pertinent to her job. While some faculty frequently used, and carried home, flash drives on lanyards around their necks, there was no evidence that any District employee carried home any confidential material, much less the amount that Lemon did. Lemon thought that having the data at home would enable her to e-mail material to District employees if contacted over the summer, but did not realize that the material would have been much easier for District employees to locate and view if Lemon had placed it on the H drive. There is no evidence that, prior to the August 5 notice of possible discipline, Lemon ever told any District employee about the nature and extent of documents she had on her flash drive.

48. During the summer, Hermansen disputed her discipline through an attorney, Hank Kaplan. Kaplan argued to the District that the deletion of Hermansen's

¹⁵Wells' copy of Lemon's C drive contained approximately 700 pages of documents; the record does not explain, nor do the parties argue, the significance of the fact that Lemon's flash drive contained approximately 100 additional pages of documents.

¹⁶Lemon does not dispute that the documents were confidential.

files was irrelevant because Lemon maintained the files. Prior to July 22, 2009, Kaplan contacted Lemon about those files. When Kaplan learned that Lemon had a copy of her files, he asked her for them, and specifically mentioned the athletic handbook.¹⁷

49. Lemon contacted former Principal Elliott about providing the files to Kaplan. Elliott told Lemon that if Lemon felt she needed to hand over the files, she should tell the District about the request.

50. Lemon also contacted co-worker Devlin, and asked Devlin's opinion about releasing her flash drive. Lemon told Devlin that an attorney, who Devlin assumed was an attorney representing the District, wanted her to turn over her flash drive. Lemon expressed concern to Devlin that she would be implicated with Hermansen in destroying files and also expressed concern about her job. Devlin told Lemon she should turn over the files to the attorney and, because she assumed the attorney represented the District, to Superintendent Reeves. Prior to this conversation, Devlin was unaware that Lemon had a flash drive with any District files on it.

51. Lemon also contacted co-worker and high school registrar Young. She told Young that both the District and Hermansen's attorney had asked her if she had District files, and asked Young's advice about what to do. Young perceived Lemon to still be angry about the Hermansen situation, and advised Lemon to provide the files to the District. Young did not offer any advice about whether Lemon should provide the files to Hermansen's attorney.

52. Lemon provided a copy of her flash drive to Kaplan prior to July 22. There is no evidence that she redacted any of the confidential student material from the drive. This was her only actual use of the flash drive during the summer.

53. On Wednesday, July 22, 2009, Kaplan e-mailed the District to report Hermansen's surprise about "how little there is" in Lemon's files, and asked the District to "recover any backups or historic records of the contents of both Lemon's H and G drives as far back in the past school year as possible."

54. Also on July 22, Jenness telephoned Lemon. Jenness told Lemon that the District would recall her to work for the fall, and told Lemon to meet with Carolyn Sweeney in the Superintendent's office to sign her contract. Lemon agreed to return to work by August 10. Jenness also asked Lemon about some materials Jenness needed to prepare for the coming school year, inquiring particularly about a camera and a copy of the student handbook that Lemon or Hermansen had revised and that Lemon kept.

¹⁷There is no evidence that Lemon told Elliott, Devlin, Young, or Kaplan that her flash drive contained confidential student information such as the expulsion list.

Lemon told Jenness that the student handbook was on her desktop, on a disk in the bottom right hand drawer of her desk, or on her zip drive,¹⁸ and that the camera was in the top drawer of her black filing cabinet. Jenness thought Lemon's tone was very cold.

Lemon did not tell Jenness that Lemon had the documents on her flash drive at home.

55. On Thursday, July 23, Lemon called Jenness. Lemon asked to meet with Jenness before a planned vacation because she had some concerns. Jenness agreed to meet with Lemon on July 29. Jenness thought Lemon's tone was even colder and sharper than her previous call.

56. By letter dated July 24, Reeves formally notified Lemon that she was being recalled to work for the fall.

57. On July 24, to comply with Kaplan's July 22 request, Reeves and Jenness asked Wells to help find athletic and activities files, the student handbook document, and a flash drive on Lemon's desk and computer. They were unsuccessful at finding physical documents, or a CD or flash drive containing any electronic documents. Wells then attempted to start Lemon's computer, which at first did not start up normally. After getting the computer running, Wells logged in under her administrative privileges, bypassing the need for Lemon's password, and reviewed the C drive on Lemon's computer, and noticed a file named "Do not delete me."

58. Within the "Do not delete me" folder, Wells found folders named "Julie" and "Julie2." Those folders contained athletic documents, correspondence, and other athletic program information. Wells was surprised to find these documents on the C drive. An electronic copy of the revised student handbook was not on the C drive or anywhere else that Wells and Jenness looked.

59. Martinez had been going through a lengthy decision process about whether to actually leave employment with the District, including consultation with her family. On July 27, Martinez gave formal notice to the District that she was leaving.¹⁹

¹⁸By "zip drive," Jenness meant a flash drive.

¹⁹District officials never contacted Martinez to see if she knew where Lemon's files were located.

60. On July 29, 2010, Lemon went to the District Superintendent's office to sign her 2009-2010 employment intent letter and spoke with Sweeney. Lemon asked Sweeney to tell Reeves that Hermansen's attorney Kaplan had contacted Lemon, and that Lemon was providing documents from her flash drive to that attorney. Lemon also told Sweeney that her (Lemon's) computer files were on her computer desktop.²⁰

61. Also on July 29, Lemon met with Jenness. Lemon told Jenness that she had a flash drive with District documents, which she had provided to Kaplan, and that the same computer files were also on her (Lemon's) District computer desktop. Jenness did not understand the range of documents Lemon was referring to, and did not ask Lemon for the flash drive. Jenness told Lemon that all of her files should be on the G and H drives so that they could be regularly backed up.

Jenness asked Lemon about the student handbook file; Lemon could not find the disk in her desk. Lemon gave Jenness a hard copy of the handbook that she sent to the student planner company. Jenness again told Lemon that she needed to save her files on the H drive. Lemon explained that in May, she removed everything off the H drive to back-up all her files on a flash drive.²¹ She also told Jenness that when files were on the H drive, she could not copy them. Lemon also commented that last year, her e-mail was deleted and she did not want that to happen again.

62. Also on July 29, the District notified Hermansen that District officials recommended that she be dismissed for the deletion of files.

63. For several days between July 29 and August 10, Lemon was away from her home on a previously planned vacation.

64. On July 29, the District began an investigation of Lemon's computer practices. IT Coordinator Wells further reviewed Lemon's files. Wells determined that Lemon had created some files and folders on the H drive, but that nothing important had been stored there since October 2008, at the latest. Wells also determined that, between June 10 and July 24, 2009, Lemon's C drive folders had been rearranged and renamed. Wells was unable to locate a computer version of the revised student handbook.

²⁰At hearing, Sweeney credibly testified that she did not recall (but did not dispute) this portion of the conversation, and by the time of hearing did not recall what, if anything, she did with the information Lemon provided. Sweeney did not work in the same building as Lemon and Jenness.

²¹Lemon's explanation was problematic in at least two respects. It was not necessary to move any documents from their original location to make copies of them, and the documents at issue were never on the H drive.

65. Reeves reviewed Lemon's C drive files to see if they were relevant to the Hermansen investigation, and concluded that some of them were.

66. In the first week of August 2009 (August 3-7), the new Athletic Director/Vice Principal, "Andy" began work.²²

67. On August 5, 2009, Devlin returned to work at the District in the high school office. She assisted District staff in searching for physical copies of various documents created or maintained by Lemon. That same day, Reeves sent a letter to Lemon notifying her of the investigation and its results, and suspended Lemon.²³ The letter stated, in part:

"On June 11, 2009, pursuant to an investigation of another employee, the District looked at the files which you had on your District computer. The investigation was concerning whether the other employee had deleted a significant amount of athletic files that the District needed for the incoming Athletic Director. When reviewing the network storage server where District employees' files are supposed to be saved, it did not appear that these files were stored to that location.

"* * * * *

"The Network Administrator, Lori Wells, went to the high school to log onto the computer. No pertinent documents were stored on the H drive, which is where they should have been stored. After searching the computer, Ms. Wells found a folder in the C drive marked 'Julie', and within that folder there were approximately 10-12 other folders that were pertinent to the high school, including a folders marked 'Athletics' and 'Heidi' which contained a large number of documents that the District needed for their use, especially for the incoming Athletics Director.

"You were officially notified of a recall to the high school secretary position on July 24, 2009. You asked for a meeting to be arranged on Monday, July 27 [*sic*] with Ms. Jenness to review expectations. After the meeting on that day, Principal Jenness again asked about the student handbook file. There was no disk on your desk, but you provided a hard copy of the student handbook. During the conversation you mentioned that Ms. Hermansen's

²²Andy's last name does not appear in the record.

²³There is no evidence that Jenness was responsible for the decisions to suspend, and then terminate, Lemon.

attorney had called you and asked for the files on your [flash] drive. You said you would give copies to the attorney and to us. It appears that you stored District files on a portable drive which you kept with you rather than leaving at the District for District use. In the course of that conversation with the principal, you were reminded that files should be saved to the H drive because otherwise if anything happened to the computer the files would be lost. You then stated that in May you removed everything off your H drive to make a back up of all files onto a zip drive, and stated that you could not make copies of the file from the H drive.

“* * * * *

“I have serious concerns about how you have handled District files and information, including making them unavailable for District use, and not saving, identifying, or preserving them according to District practice. When you left the office in June, you had been laid off, and you were aware that another person was being trained to fill the secretary position. You were also aware that a new Athletic Director was being hired. Even though you were aware of this, it appears that you deliberately put a large number of District files that would be necessary to the Athletic Director, to your successor, and to the District in a location that no one but you knew about, and that only you would be able to access but for the network administrator’s investigation in searching for those documents. In addition to numerous athletic files, there were many other files that appeared to be very instructive for the successor who would have been performing the duties of the secretary position but for the recent recall.

“You should have stored District files on the H drive, not to the C drive. You should have known that District practice is to save to the H or G drive and that the C drive is not typically used and District staff would likely not look there for necessary files. You should have known that the C drive is not backed up by the District and that any problems or ‘crashes’ to your computer would have resulted in the loss of the files. You should have known that naming them under your personal name would not have easily identified them as necessary documents.

“It appears many of these items were on your computer, on the C drive, on or about June 10, 2009, under another title which also did not identify the type of documents they were. Sometime after that date, these folders and documents were combined and renamed in a folder with your personal name. You should have known at that time that it would make them

difficult to find, and that only you or the Network Administrator would be able to access them if they were discovered.^[24] All of these indicate deliberate disregard for the proper storage of necessary District files.

“Further, it appears that your actions, while in this position, were deliberate and intentional, and that you were keeping District property from District employees in a manner that disrupted the business of the Athletic Department and to your successor, and that was detrimental to the interests of your employer. ^[25]If you had not been subject to recall, and your computer further examined, it is unlikely the files would have been discovered and this would have caused a great deal of disruption and additional work for the District.

“I am now suspending you with pay while this matter is investigated further. The District has been unable to locate any portable drives with District files at the workstation you used. Please immediately provide any portable drives that contain District files as part of the investigation.

“Furthermore, I am considering initiating discipline or dismissal based on incompetency, inefficiency, neglect of duty, and/or conduct detrimental to the District or its personnel. Before I finalize my decision regarding this matter, I wish to meet with you. You may bring representation. I am setting a meeting for Wednesday, August 12, 2009, at ten o'clock.”

68. On August 12, 2009, Lemon attended the meeting as directed. Lemon was represented by Victor Musial, Union Director of Field Operations, and Alice Swanson, Union Local President. The District was represented by Kelly Noor, Counsel for the District, Sweeney from District Human Resources, and Superintendent Reeves. The meeting was recorded and transcribed.

69. At the start of the meeting, Noor told Lemon, “[b]asically what we're looking for is an explanation of why the District files were stored in the way that they were and wouldn't have been accessible to someone who would have come in and looked for documents that they would have needed if they were working this position.”

²⁴Superintendent Reeves testified that she interviewed Devlin as part of her investigation. During this interview, Devlin told Reeves that Lemon had explained to Devlin that her (Lemon's) files were on her computer desktop.

²⁵Superintendent Reeves testified that it appeared that Ms. Lemon's actions in failing to save files to her H drive were an “intentional act to deceive the District,” but that she could not be certain.

70. At the meeting, Lemon provided the following responses to some of the questions she was asked:

“K.N. [Kelly Noor] How do you normally store documents on a District computer when you’re working at work?”

“J.L. Usually, I have a file on my desktop named ‘Shortcut to Julie’ that Jill Kahle set up when I was job sharing with Kelli Beau (?). It leads to a file that says ‘Julie’ and that’s where I kept all documents that I saved. Documents that I was currently working on, I always kept on my desktop until they were finalized and then, just cause they’re easier access and then saved them on that.

“* * * * *

“J.L. In the third paragraph, it states that I stated the handbook was on my desktop on a disk, on the bottom right-hand drawer of my desk. I’m sorry (crying).

“V.M. [Victor Musial] Take your time.

“J.L. I never stated or on any of that. I told her it is on my desktop under my ‘Shortcut to Julie’. I stated it was in my drawer. But the other thing you have to understand is that the last week of school, my last five days, were spent rearranging and cleaning the entire office, so all of my files that I have had for three years, all file cabinets were moved. So, I wasn’t sure exactly where it was and that is when I stated to De Ann that I had it on a [flash] drive and if she needed it electronically, I would be more than happy to email it to her if she’d just called me back. I never stated that the disk or that the [flash] drive was in the office. I also stated at that time that if she needed my help to just call me back and I would help her.

“In the second to the last paragraph in the letter, it said there was no disk in my desk but I provided a hardcopy with the student handbook, it was because I was looking through my files, I hadn’t seen them since I left. They have been rearranged, I hadn’t put them all in order because I had

intended on doing that my first week back to work. I handed her the hardcopy and I told her 'it's right here on my desktop, would you like me to pull it up.' She said, 'no, this is fine.' So at that time, I thought I had provided what she wanted and what you wanted. Also, I want to say too that none of these documents were requested of me before I left. Nothing was requested of me at all. So, I had no idea that I was being uncooperative, that I was hiding files, nothing had been required of me.

"I disagree with the fact that I made it unavailable for District use. The reason the files were named under my name is because when you open the H drive, the first thing you'll see is the list from A to Z of every employee, first name, because that's how we know whose files are whose. I pulled it off of the H drive in order to make a copy because of an email sent out by Lori Wells, head of Technology, telling us that it would be a good idea to backup all lesson plans and I did because last year when we came back, things had been deleted and I had every intention of returning to my job.

"That's why it was under my personal name. It was under 'Shortcut to Julie' because that is the way that Jill Kahle, the Technology Assistant in our building, set it up as.

"I really dispute a couple of things in the last couple of paragraphs. First of all, the third to the last paragraph where it said if I had not been subject to recall, under further examination, it's unlikely that the files would have been discovered and would have caused a great deal of disruption and additional work for the District. There was only one file on my computer that contained any kind of documents and it was the file named 'Julie.' It would have been the only place that you would have looked. I also met with Connie Devlin on June 11, the day after my layoff because Renee had not made public at that point that she was resigning. I told Connie at that point that I would help her in anyway possible; that all my files were under 'Julie' and it was labeled as such. Athletics, Correspondence, Attendance and Concessions, so that under each of those files there was a subfile that would help her with each season.

* * * * *

"K.N. [you] didn't have files stored on the H drive when you left?

"J.L. I didn't. I had, in order to make the backup copy, I had tried to click on 'Shortcut to Julie' and just copy and drag so that I hadn't, you know, the backup that way. It didn't, instead what it did was copy the icon and so I pulled it off of the H drive in order to make the copy and I just didn't put it back. To tell you honestly, I wasn't thinking of covering my butt when I left, I just was busy and didn't replace it back to the H drive. Previously to Jill Kahle setting it up on the H drive with my counterpart, Kelli Beau, all of our files had been stored on the C drive.

"K.N. And when would that have been?

"J.L. Three years ago, approximately. Probably closer to two and one-half, I think it was like October or something. I don't remember the exact date.

* * * * *

"J.L. I deleted no documents that were pertinent to any official position. All I did was make a backup, that's the only reason why I pulled it off was to make a backup.

"A.S. [Alice Swanson] And they are still on your desktop.

"J.L. They are still on my desktop.

* * * * *

"V.M. And so then before you left, or the day after your last day, your temporary successor, for a lack of a better term, you informed that person this is where all the stuff is.

"J.L. I informed her the day after my layoff notice because Renee had not made it public to everyone at that point that she was not returning and that was not my job to make that public.

- "V.M. Alright. So you knew and you told someone else, here's where the stuff is. I haven't got it back on the H drive yet, so here's where it is.
- "J.L. Well, I didn't say that I hadn't gotten it back on the H drive.
- "V.M. But . . . okay.
- "J.L. I just told her there's a file on my desktop named 'Julie' and she will find everything she needs in there.
- "V.M. And, have you been given a copy. So is there a, um, policy or practice you've been given, any document saying this is where you have to keep the files on the H drive?
- "J.L. When Jill Kahle originally put it on the H drive, I job shared with Kelli Beau and so everything was saved on her C drive and I was signing in as her to have access to those files because we worked, at that time, we worked for Steve Atkinson and Heidi and Glenn. And so, I signed in as her everyday so that I would have access to any documents that she had been working on and continue any projects because I worked Monday, Tuesday; she worked Wednesday, Thursday, Friday. When I was hired on officially at that point, I was, we asked Jill Kahle to come and make it so that we could access from my sign-in those documents and from Kelli's sign-in and that's when Jill came and said, oh, this is suppose to be stored on the G drive or the H drive. Actually, I think my documents are stored on the G drive to tell you honestly. I don't even remember. I think it's the G drive or H drive.^[26] But she set it up so that when Kelli signed on a little icon popped up that said 'Shortcut to Julie' and when I signed on, an icon popped up that said 'Shortcut to Julie' and inside of that were Kelli's files and my files, within the same file. So that we could both get to whatever documents the other person was working on and that's why everything

²⁶Aside from this statement, Lemon appeared to be certain at all times that her documents were supposed to be saved to the H drive.

is laid out as Athletics, I mean its laid out that why cause that was our filing system so that we could get to everything.

“V.M. Okay.

“A.S. So, did you ever feel like you were doing anything wrong, Julie, or were you ever given, ever say to you or did you read anything that said if you don't store these things on the H drive then it really could be seriously bad for you or even allude to that. Did you have that feeling that, that these things need to be on the H drive?

“J.L. Well, I know we were to have things on the H drive cause obviously I pulled it off the H drive. I just didn't have time to put it back and because I had to backup and because I fully intended on coming back, I hadn't seen it as a big issue and I mean, I didn't see it as an issue.[²⁷]

“V.M. So, it's still on the C drive, right? And you had it on a [flash] drive as well, right?

“J.L. Yes.

²⁷At hearing, Lemon testified that she believed, throughout her employment and at the August 12 meeting, that she had been saving her documents to the H drive. After hearing Wells' testimony at the hearing that there “wasn't hardly anything saved on the H drive,” Lemon stated that she realized that she had not been using the H drive after all. Lemon was aware, throughout her employment, that she was supposed to save documents to the H drive, and testified that Jenness spoke with her on July 29 about storing items on the H drive, however. At hearing, and during the August 12 meeting, Lemon acknowledged reading the statement in the August 5 letter accusing her of not saving items to the H drive. Lemon also acknowledged at hearing that, at the August 12 meeting, she had repeatedly stated that she knew files were to be saved to the H drive and that she did save them there up until she moved them in June 2009. Lemon stated that her misunderstanding was due to the way Kahle had set up her computer in 2006 and August 2008. In fact, Kahle had set up Lemon's computer to save documents to the H drive, and the proposed location of documents would appear on the computer every time Lemon saved a document. As a result, from at least August 2008 to her last day of work, Lemon would have had to make a choice to save each document to the C drive, just as she chose to save items to her “desktop until they were finalized.”

“V.M. Okay. And did you know that the District regularly backed up the H drive and the G drive?”

“J.L. Yes.

“V.M. Did you know that they did not back up the C drive?”

“J.L. No, I did not, but I did so I wasn’t worried.

“V.M. Okay. You backed up the C drive yourself?”

“J.L. Because that’s what we were instructed to do was to backup our files for future reference.”

71. Wells did not believe that Lemon’s explanations of her use of the H drive made sense, because there was no sign that Lemon had *ever* stored most of the athletic and activity files on the H drive, Lemon did not need to remove documents from the H drive to copy or back them up, and that if Lemon were being accurate about removing the files from the H drive to back them up, she failed to replace them in the remaining two weeks she worked. Wells also believed that it did not make sense that Lemon kept all of her documents on the C drive, because they would not be backed up and, to her knowledge, no other District employee did this.

72. Lemon gave the District her flash drive at the August 12 meeting. After the meeting, Reeves reviewed the material on the drive. She was particularly surprised and concerned at the presence of confidential student expulsion information. Reeves then gave the flash drive to Wells for further review and copying. Wells did not delete anything from the drive, except the Athletics files. Wells then gave the drive back to Reeves to return to Lemon. Reeves returned the drive to Lemon, without deleting any additional documents from the drive, where they remained at the time of hearing. The District, therefore, returned copies of confidential student documents to Lemon.²⁸

73. On August 17, Hermansen resigned to accept a position with another school district.

74. By letter dated August 28, 2009, Reeves dismissed Lemon from employment with the District. The letter stated, in part:

²⁸At this time, the flash drive and its contents were evidence in Lemon’s disciplinary proceeding and were likely to be evidence in a grievance, but the District does not claim that this was the reason for returning the documents.

"I sent you a letter on August 5, 2009 which outlined a list of concerns I had about your performance as an employee. You had the opportunity to respond to all of those concerns at a due process meeting, accompanied by representation, on August 12, 2009. After further investigation, a review of your responses to these allegations, and considerable thought I am dismissing you from employment with the North Marion School District, based on incompetency, inefficiency, neglect of duty, and/or conduct detrimental to the District or its personnel. The initial allegations from that August 5, 2009 letter and this letter provide the basis for your dismissal.

"The incident which led to the concerns about your employment performance was the office staff's inability to locate necessary documents. Staff searched for, and were initially unable to find, any of the necessary files and documents which were important for the incoming Athletic Director. After considerable investigation, effort, and a detailed search of the computer you used, these documents were found. However, these documents were not stored according to District practice to ensure they would be properly backed up, were not labeled in a manner to identify them to District personnel, and you did not leave information or instructions regarding the location of these files.

"You had a duty as an employee to follow District practices to preserve files, documents, and other electronic property, and you also had an obligation to make sure that these files and documents were accessible to District personnel. You failed to meet this duty when you did not save or label files appropriately and when you saved all the files to your personal [flash] drive and kept them over the summer while you were laid off.

"The manner in which you identified folders under your personal name, organized folders within folders without appropriate identification or labels for documents, and failed to store them on the appropriate drive, prevented the District from being able to find or access these documents until they were discovered weeks after you were laid off, after considerable efforts were made to locate these files by staff.

"In this particular case, you should have known that preserving and accessing the files was of even greater importance to the District, because you were aware that the Dean of Students was not returning to that position and that there was a new Athletic Director who would need to use many of those files, who would have no familiarity with what files there

were and where they were stored. Furthermore, the previous Dean/Athletic Director indicated that she had asked you to preserve certain useful files prior to leaving that position.

“During the August 12 meeting you made several statements in explanation, but these statements did not excuse your actions. Some of the statements you made, in fact, have not been supported by additional investigation, and some of your statements actually added to the list of concerns with your performance. There was no support for the statement you made that another secretary had been informed about the location of these files.

“You admitted that you know the District practice is to store documents and files on the H drive in order to ensure they would be backed up and preserved, and yet you failed to store all of these files on the H drive, putting them at risk of being lost completely if the computer crashed.

“You said that even though you were laid off from your position and were training someone else to work in that secretarial position, you had a reasonable expectation that you would be returning and therefore the files would be accessible to you on your return. However, you were not notified of the recall until approximately July 22, 2009. You should have known that there was not a guarantee of returning on recall, and even if it were reasonable to expect that you would be recalled, it was still your duty to store all of these documents in a manner in which they would be preserved, and in a manner that made them easily accessible to any District personnel who needed them; you neglected these duties.

“You indicated that you had stored all of these District documents on a portable drive that belonged to you and that they would have been available if anyone had called you over the summer. At my request, you provided your portable drive to the District at the August 12 meeting, and the District downloaded the files from your drive. You had a very large number of District documents and files on that drive, including some with confidential student information protected under state and federal law. There is no evidence that you told any person at the District that you were making backups of those files and taking them with you when you were laid off. This was an inefficient and incompetent manner to store District documents, is not in keeping with District practice, and did not make them available to the District. You also had no authority to download these documents onto your personal drive, and keep them with you during the

summer, regardless of any expectations you had for recall. You should have known that it is against District practice to have an employee in your position store or maintain files and confidential information in this manner, and that it was not a reasonable way to store or preserve these files. The files on that portable drive were at further risk for loss. In addition, the confidential student information on your portable drive created a further risk of disclosure in violation of state and federal law. This conduct is detrimental to the District and although I regret that it is necessary to make this decision, we are unable to keep an employee who does not demonstrate the proper care and regard for District property or who fails to support the District's practices. Your dismissal is effective immediately."

75. On September 10, 2009, the Association filed a grievance over Lemon's termination, and presented her position. On September 29, Lemon appeared before the District Board at a hearing pursuant to Article 20.3.4 of the Agreement. Lemon was represented by Tom Motko, Association field representative; Association local president Swanson was also present. The District Board did not allow Mr. Motko to present witnesses. Motko had intended to provide testimony from two witnesses: (1) Lemon, to tell her side of the story about what she had done; and (2) former high school Principal Elliott about Lemon's prior good performance and Elliott's belief in Lemon's good character.²⁹ Motko made a statement based on previously typed notes on Lemon's behalf, summarizing the evidence he had intended to present through the witnesses, and Lemon answered questions from Board members. Motko did not seek to present Devlin as a witness, and his written notes did not address Lemon's conversations with Devlin about the location of Lemon's files and password.

76. On October 1, 2009, the District Board denied the grievance and upheld Lemon's dismissal.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District violated ORS 243.672(1)(g) when it dismissed Julie Lemon.

²⁹Motko did not plan to present the testimony of any other witnesses, including Devlin or Martinez.

The District dismissed high school secretary Julie Lemon because she failed to follow appropriate District practices for preserving and storing computer files and failed to make these files readily accessible to other District employees. According to the District, Lemon's actions demonstrated "incompetency, inefficiency, neglect of duty, and/or conduct detrimental to the District or its personnel" and justified her dismissal under Article 14.1 of the collective bargaining agreement. Article 14.1 requires that dismissal of Union bargaining unit employees "shall be for just cause," and lists a number of examples of conduct for which employees may be dismissed. "Incompetency, inefficiency, neglect of duty" and "conduct detrimental to the District or its personnel" are among the listed examples.

The Union contends, however, that the District lacked just cause to dismiss Lemon. According to the Union, the dismissal violated the parties' contract and ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to violate the provisions of "any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding on them." Where the parties' collective bargaining agreement does not contain an arbitration clause, this Board may interpret the terms of the contract in proceedings brought under subsection (1)(g). *Oregon School Employees Association, Chapter 81 v. Stanfield School District 61R*, Case No. UP-11-06, 21 PECBR 505 (2006), *AWOP*, 215 Or App 358 (2007); *Oregon School Employees Association, Chapter 115 v. Pendleton School District 16R*, Case No. C-97-83, 8 PECBR 8223 (1985). Our role in this case, then, is to interpret Article 14 to determine whether the District violated this contractual provision when it dismissed Lemon.

Standards for Decision

The contract language at issue in Article 14.1 states that employees will be dismissed for just cause. In analyzing a contractual just cause provision under subsection (1)(g), we begin by determining if the employee actually did what the employee was disciplined for. *Oregon Education Association v. Willamette Education Service District*, Case No. UP-8-07, 22 PECBR 585, 609 (2008) (citing *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 140 (2007)); *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986); *Association of Oregon Corrections Employees v. Oregon Department of Corrections*, Case No. UP-21-94, 15 PECBR 621 (1995); and *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 15 PECBR 115, *recons*, 15 PECBR 474 (1995). Unless the parties provide differently in their collective bargaining agreement, we then apply a "reasonable employer" test to determine if the employer had just cause for its disciplinary action. *Oregon School Employees Association v.*

Lincoln County School District, Case No. UP-66-95, 16 PECBR 545, 551 (1996).³⁰ The reasonable employer test is derived from the standards used by arbitrators to interpret contractual just cause provisions and encompasses these principles, which are often called the “common law of labor relations.” *Klamath County School District*, 9 PECBR at 8849 (1986).

The reasonable employer test is an objective one, under which we judge the discipline at issue on the basis of whether a fictive reasonable employer would have taken the same action under similar circumstances. *Oregon Trail School District*, 22 PECBR at 140. Although there is no single, comprehensive definition of a reasonable employer, a reasonable employer generally “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 when the offense is gross.” *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (2004) (citing cases). A reasonable employer also enforces reasonable rules, gives employees fair notice that violations of the rules may result in discipline, and disciplines employees in a timely manner. *Oregon Trail School District*, 22 PECBR at 140 (citing *Klamath County School District*, 9 PECBR at 8850-52). Finally, a reasonable employer warns employees of proposed discipline, gives employees an opportunity to refute the charges, makes a fair investigation before administering the discipline, and takes disciplinary action based on substantial evidence. *Id.*

³⁰The contract language at issue here differs from that in *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 416, 425 (2006). In *Deschutes County*, the parties’ collective bargaining agreement stated that employees would be disciplined only for just cause; the contract also specified certain types of conduct for which employees must be disciplined, including “violation of Department rules.” We concluded that we look “first to the words of the contract to determine the contractual standards the District must meet in order to discipline a bargaining unit member. We resort to common law definitions only if the contract language fails to provide an answer.” *Id.* at 425 n 5. We held that because the parties had negotiated “their own standards of what constitutes just cause for discipline,” we would apply these standards and not the “common law of labor relations.” We analyzed whether the city had proven the “violation of Department rules” that constituted the reason for disciplining the grievant and concluded that the city failed to prove this charge. *Id.*

Here, Article 14.1 of the collective bargaining agreement specifies that discipline and dismissal of employees “shall be for just cause.” It then provides examples of conduct for which an employee “may be subject to dismissal.” These examples are illustrative only and, unlike the language at issue in *Deschutes County*, create no standard for dismissal that is separate and apart from just cause. For this reason, it is appropriate to apply the “common law definition” of just cause embodied in the reasonable employer standard.

The reasons for Lemon's dismissal in the District's August 28, 2009 letter can be summarized as follows:

(1) Lemon failed to label and store her files in a manner consistent with District practice, and did not make these files accessible to other District employees.

(2) Lemon engaged in "conduct detrimental to the District" when she stored a large number of District documents and files, some of which contained confidential student information, on a flash drive which she took home with her at the end of the 2008-2009 school year.

The employer bears the burden of proving the elements needed to prove the discipline. *Oregon Trail School District*, 22 PECBR at 140.³¹ Guided by these principles, we analyze the District's dismissal of Lemon, and consider each of the reasons upon which her dismissal is based under the reasonable employer standard.

Organization, Preservation, and Accessibility of Lemon's Computer Files

At the end of the 2008-2009 school year, the District examined Lemon's computer and discovered that many files needed for District use were stored on her C drive in folders with names such as "Julie," "Athletics," and "Heidi." The District

³¹The Association argues that, in reviewing discipline imposed under a collective bargaining agreement, this Board sits in the position of an arbitrator. The Association contends that we should therefore apply the standard customarily used by arbitrators in discipline cases: the employer has the burden of proof to demonstrate the charges by "clear and convincing evidence." (Association Post-Hearing Brief, p. 6.)

We rejected this argument in *Oregon Public Employees Union and State of Oregon Department*, 15 PECBR 115, where we declined to apply a "clear and convincing" standard of proof in a case alleging that the employer discharged an employee without just cause, in violation of the contract just cause procedure and subsection (1)(g). We explained:

"The ultimate issue is simply whether a collective bargaining agreement was violated. Proof of the underlying facts by a preponderance of the evidence is the appropriate standard. In any event, it appears that the Court of Appeals has decided the question:

'[T]he Court of Appeals has held that, in the absence of legislation adopting a different standard, the standard for proof of a particular fact or position in an administrative proceeding is by a preponderance of the evidence. [Citing cases.] *Oregon Attorney General's Administrative Law Manual* (1993) at 98." 15 PECBR at 117-18 (footnote omitted).

contends that as a result of these actions other District employees could not readily find the files because they were not clearly labeled and not stored on the G or H drive. (The G and H drives are shared by all District computer users, and files on these drives can be accessed without a password. District employees other than Lemon and IT coordinator Wells could not access files on the C drive without Lemon's password.) In addition, the District charged that Lemon's files were at risk of being deleted should a computer mishap occur, because the District does not back up files on the C drive.

The record contains no evidence of any District guidelines or policy instructing employees how to set up their computer files.³² To the contrary, employees have discretion to label and store files in a manner most convenient for them. Since no District rules regarding file organization and labeling exist, the District acted unreasonably in disciplining Lemon for violating a non-existent rule.

In regard to the District practice requiring storage of all files on the G or H drive, Lemon was never made aware of any written District policy or rule imposing such a requirement.³³ All the computer training Lemon received was administered by her co-workers and peers—other District support staff. Thus, Lemon's understanding that she should save files on the H drive was based entirely on what she learned from other employees. Lemon had no clear notice, in the form of a written or oral directive from a supervisor, that she was required to save her files on the H drive and could be disciplined if she did not do so. As discussed above, one of the characteristics of a reasonable employer is that the employer enforces reasonable rules and gives employees notice that violations of the rule may result in discipline. *See* Norman Brand, *Discipline and Discharge in Arbitration*, 79 (1998) ("A rule must clearly and unambiguously establish the scope of prohibited conduct, as well as the consequences of violations, in order to be enforceable."). The District's actions in disciplining Lemon for disobeying a rule of which she was unaware were not those of a reasonable employer.

The District also did not prove that Lemon violated District practice by failing to make her files accessible to other District employees. As discussed above, Lemon was never instructed—orally or in writing—that she must make her files readily available to

³²The District does not assert that it had any policies concerning the organization and preservation of computer files. In the August 5 letter suspending Lemon and the August 28 letter dismissing her, Superintendent Reeves refers to District "practice" in regard to preserving and backing up files, but never to any policy regarding these matters.

³³The District maintained reference documents in a virtual location, the "Portal." The Portal contained instructions on use of the computer, including instructions on how to back up documents and files. There is no evidence that Lemon was directed to or actually viewed documents on the Portal. Nor is there any evidence that any document in the Portal instructed employees they were required to save documents on the H drive and warned them of disciplinary consequences for failing to do so. (Finding of Fact 15 n 5.)

other employees by storing them on the G or H drive. Nor does the record contain evidence that the District expected or required that a laid off employee tell other employees where important files could be found. Lemon did tell Devlin, her successor, that her files were located on her desktop and gave Devlin the password needed to access these files.

The District argues, however, that the District's investigation and suspension of Hermansen should have given Lemon adequate warning about the need to properly preserve District files and the consequences of failing to do so. According to the District, Lemon knew that the District was investigating Hermansen in June 2009 for allegedly improper actions in regard to District computer files. The District contends that this investigation should have been sufficient to apprise Lemon of the potential for disciplinary action if she did not follow District procedures in regard to her files. We disagree.

Lemon knew that the District placed Hermansen on paid leave on June 11 to investigate her alleged deletion of computer files. The District's actions may have warned Lemon about the potential consequences of *deleting* files, but did not reasonably give her any indication of what might happen if Lemon failed to properly back up her files.

Lemon's Storage of District Files on a Flash Drive

Between May and June 2009, Lemon backed up District files from her C drive on a personal flash drive. The files Lemon backed up consisted of approximately 800 pages of documents that included confidential student information such as expulsion letters and lists of failing students; sports forms; locker combinations; and student attendance information. At the time she performed this backup, Lemon understood that she would probably not return to work with the District for the 2009-2010 school year.

After the District laid her off in June 2009, Lemon took the personal flash drive with District files on it to her home and stored it in a closet.

The District charges that Lemon's actions in storing backups of important and confidential District documents on a flash drive and keeping the flash drive in her home closet constituted "conduct detrimental to the District."

Lemon's backup of files on a personal flash drive did not violate District policy or procedure. On May 11, 2009, IT Coordinator Wells instructed staff to delete unnecessary files and backup necessary files on an external disc or flash drive. Wells expected that employees would exercise their own discretion in determining what files to back up and delete. (Finding of Fact 18.) Thus, Lemon's choice of files to back up and her use of a personal flash drive to make these backups was consistent with the directions she had been given.

Lemon's actions in keeping the flash drive in her home closet was, however, unreasonable; it put important and confidential information at risk of loss or disclosure. Lemon knew that her flash drive contained the back up of files on the C drive of her work computer. Lemon also knew that files on her C drive were not otherwise backed up. Had the flash drive been inadvertently or deliberately taken from Lemon's closet, unauthorized individuals could have gained access to the files on it. If the flash drive was lost or destroyed, and the District experienced a computer malfunction, information important to the District's operations would have been lost.

Also troubling about Lemon's decision to keep files at her home was her uncertain future with the District. At the time Lemon took the flash drive home, she was no longer employed by the District and did not know if she would be returning to work for the District. Lemon's actions as a non-District employee—keeping confidential files that were of no use to her in an insecure location—were unreasonable.

The record contains no evidence of any District policy or practice regarding the storage of confidential information. Even if an employer has failed to specify that certain types of conduct is prohibited, however, a reasonable employee should know that some conduct is so harmful to an employer that it is unacceptable. Brand, *Discipline and Discharge in Arbitration*, 78 (1998). As an experienced school secretary, Lemon knew or should have known that confidential files must be stored in a secure manner and location. Consequently, she should have understood it was unreasonable to keep a flash drive containing important and highly personal information in her closet.³⁴

³⁴In its August 5 letter suspending Lemon, the District stated that Lemon's actions in failing to properly store files in a manner accessible to other District employees "were deliberate and intentional" and that Lemon kept property from other District employees in a manner disruptive to the Athletic Department and Lemon's successor. (Finding of Fact 67.) In the August 28 letter dismissing Lemon, however, the District does not characterize Lemon's actions as either deliberate or intentional. Instead, the District charges that Lemon failed to meet her duty to follow District practice regarding preservation of files and documents. Although the August 28 letter is not a model of clarity on this point, it appears that the District dropped the charge that Lemon's actions constituted an intentional and deliberate attempt to hide information from other District employees.

Even if the District based its dismissal of Lemon on the charge that she deliberately and intentionally withheld information from the District, the District did not meet its burden to prove this charge. At the hearing, Superintendent Reeves testified that she could not be certain that Lemon's failure to save files on the H drive was an intentional act to deceive the District. (Finding of Fact 67 n 30.)

Remedy

The District did not prove that Lemon failed to label and store her files in a manner consistent with District practice or that she failed to make these files accessible to other employees. The District did prove the charge that Lemon engaged in “conduct detrimental to the District” when she kept a flash drive containing important and confidential information in her home closet. We now determine what form of discipline is appropriate for Lemon’s misconduct.

The District’s decision to dismiss Lemon is contrary to an important requirement of the reasonable employer test: that an employer consider principles of progressive discipline to determine a sanction appropriate to an employee’s misconduct. A reasonable employer generally uses progressive discipline unless the employee’s offense is gross or the employee’s behavior probably will not be improved through such measures. *Oregon School Employees Association, Chapter 89 v. Rainier School District 13*, Case No. UP-85-85, 9 PECBR 9254, 9728 (1986). Discipline is progressive if it imposes “corrective measures that put the employe on notice that further misconduct may result in the discipline ultimately imposed and that give the employe a reasonable opportunity to modify his [*sic*] behavior.” *Id.* at 9279 (footnote omitted).

The District contends that Lemon’s actions in failing to properly secure confidential material constituted misconduct so serious that progressive discipline was inappropriate. We disagree. The District’s own actions do not indicate great concern to protect the material Lemon kept on the flash drive stored in her home closet. During the investigation, the District obtained and checked the flash drive on which Lemon kept District files. At the conclusion of the investigation, the District returned the flash drive to Lemon without deleting any material from it. The record also indicates that Lemon’s behavior probably could be improved by corrective measures. Lemon is intelligent, articulate, and personable, and had no record of discipline prior to her suspension and dismissal. Lemon’s supervisor rated her as meeting expectations in all areas of her performance.

We conclude that the principles of progressive discipline are best served by the following actions: reprimanding Lemon in writing for her failure to maintain confidential files in a secure location, explaining District policies or practices regarding collection and storage of confidential information, warning Lemon of future disciplinary consequences if she does not comply with these policies or practices, and imposing a two-month suspension without pay for failing to maintain confidential files in a secure location.

ORDER

The District shall reinstate Lemon to the position she held prior to her dismissal. Upon reinstatement, the District may reprimand Lemon in writing for her failure to maintain confidential files in a secure location, explain District practices or policies regarding collection and storage of confidential information, warn Lemon of future disciplinary consequences for failing to comply with these practices or policies, and suspend Lemon for a period of two months without pay. The District shall make Lemon whole for the wages and benefits she would have received if she had continued working for the District, less interim earnings and less the wages Lemon would have earned during her two-month suspension, with interest at the rate of 9 percent per annum, beginning on August 28, 2009, and ending on the date that Lemon resumes work for the District.

DATED this 12 day of March 2012.



Susan Rossiter, Chair



Paul B. Ganson, 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.