

**THE
STATE PERSONNEL RELATIONS LAW
DIGEST
SUPPLEMENT**

January 1, 2009 – December 31, 2016

State of Oregon
Employment Relations Board
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Table of Contents

Introduction

Outline of Classifications

Chapter 1 – Jurisdiction of ERB

Chapter 2 – Relationship to Constitution

Chapter 3 – Terms and Definitions

Chapter 4 – Issuance of Personnel Action and Statement of Charges

Chapter 5 – Appeal Procedure

Chapter 6 – Affirmative Defenses

Chapter 7 – Prehearing Practice

Chapter 8 – Hearing

Chapter 9 – Board and Appellate Court Review

Chapter 10 – Appeals of Actions Effective before July 1, 1981

Chapter 11 – Classified Employees' Appeals of Actions Effective on and after
July 1, 1981: Employee Not Included in Bargaining Unit

Chapter 12 – Management Service Employment (effective July 1981)

Chapter 13 – Cause for Discipline or Removal

Chapter 14 – Executive and Unclassified Service Employment

Chapter 15 – Remedies

Chapter 16 – Evidentiary and Other Rulings

Chapter 17 – Review/Enforcement of State Employee Arbitration Awards

Chapter 18 – Temporary Employment

Chapter 19 – Workers Compensation Board Administrative Law Judges

Alphabetical List of Cases

Alphabetical Index of Topics

Introduction

This volume supplements *The State Personnel Relations Law Digest 1980-1992* and *The State Personnel Relations Law Digest 1993-2008*, both of which were previously published by the Oregon Employment Relations Board. This volume is intended to be a digest of all State Personnel Relations Law (SPRL) decisions rendered by the Board and the appellate courts from January 1, 2009 through December 31, 2016.

Users should note that this volume includes two new classifications:

- 3.13a – “Malfeasance” – ORS 240.555
- 13.12a – Electronic and communications systems (email, messaging, cell phones, personal computers, networks), misuse of

The SPRL, ORS ch 240, grants State of Oregon employees certain employment rights. The Employment Relations Board (ERB) reviews personnel action appeals and petitions filed by State employees.

The entries in each section of *The SPRL Digest* are arranged in reverse chronological order, with the most recent decisions listed first.

The notes and entries in *The SPRL Digest Supplement* are not official rulings or pronouncements of the Employment Relations Board and should not be viewed as official interpretations of Board or court decisions. *The SPRL Digest Supplement* may be used to identify decisions in which the Board and the courts have discussed various issues. Readers should review the actual text of the decisions to determine the precise holdings of the Board and the courts. Further, readers should consult with competent professionals for legal advice or other expert assistance.

Copies of the Board’s decisions issued since January 1, 2004, are available on the agency’s website: <http://www.oregon.gov/ERB/Pages/index.aspx>. Copies of orders may also be obtained from the Board: Emprel.board@oregon.gov; (503) 378-3807; 528 Cottage Street, N.E., Suite 400, Salem, Oregon 97301-3807.

Outline of Classifications

Chapter 1 – Jurisdiction of ERB

- 1.1 Classified employees not included in bargaining unit
- 1.2 Classified employees included in bargaining unit
- 1.3 Management service
- 1.4 Unclassified service
- 1.5 Temporary service (see also chapter 18)
- 1.6 Exempt service
- 1.7 Applicant for employment
- 1.8 ERB jurisdiction under ORS 243.650 et seq.
- 1.9 Civil rights, Americans with Disabilities Act (ADA), and other laws
- 1.10 Judicial Department employees
- 1.11 Oregon State System of Higher Education employees
- 1.12 Oregon Health Sciences University employees
- 1.13 Public Utility Commission positions transferred to DOT
- 1.14 Review of arbitration awards
- 1.15 Workers Compensation Board Administrative Law Judges

Chapter 2 – Relationship to Constitution

- 2.1 Fourteenth Amendment due process clause (see also 4.1)
- 2.2 Vesting of SPRL rights
- 2.3 First Amendment free speech clause
- 2.4 Right to Privacy (Oregon Constitution Article I, Section 8)
- 2.5 Other constitutional rights

Chapter 3 – Terms and Definitions

- 3.1 “Affected party” (former ORS 240.086(2))
- 3.2 “Agency” – ORS 240.570(1)
- 3.3 “Appeal” – ORS 240.560(1)
- 3.4 “Arbitrary” – ORS 240.086(1)
- 3.5 “Assign” – ORS 240.570(4)
- 3.6 “Bad faith” (not in good faith) – ORS 240.560(4)
- 3.7 “Constructive discharge/discipline” (see also 10.2.2, 11.2.2, 12.3.2)
- 3.8 “Contrary to law” – ORS 240.086(1)
- 3.9 “For the good of the service” – ORS 240.316(4), 240.570(2)
- 3.10 “Implied resignation”/resignation (see also 10.2.16, 11.2.16, 12.3.17)
- 3.11 “Inefficiency” – ORS 240.555
- 3.12 “Insubordination” – ORS 240.555
- 3.13 “Issue” (to issue discipline)
- 3.13a “Malfeasance” – ORS 240.555 (*this is a new topic heading in this Supplement*)
- 3.14 “Misconduct” – ORS 240.555
- 3.15 “Misrepresentation”
- 3.16 “Personnel action” – ORS 240.086(1)
- 3.17 “Political reasons” – ORS 240.560(3)
- 3.17a “Progressive discipline”
- 3.18 “Rank”

- 3.19 “Reasonable employer” (see also 11.1 and 12.1)
- 3.20 “Red-lining”
- 3.20a “Reprimand”
- 3.21 “Substantial evidence” – ORS 183.482(8)(c)
- 3.22 “Unfitness to render effective service” – ORS 240.555
- 3.23 “Work now, grieve later”
- 3.24 Other definitions

Chapter 4 – Issuance of Personnel Action and Statement of Charges

- 4.1 Notice of expectations and deficiencies (see also 2.1 and 16.7)
- 4.2 Clarity and specificity of charges
- 4.3 Waiver of prosecution – failure to discipline in a timely manner (see also 6.7)
- 4.4 Amendment of charge
- 4.5 Rescission and reimposition of personnel action

Chapter 5 – Appeal Procedure

- 5.1 Appeal to Executive Department—timeliness
- 5.2 Appeal to ERB
 - 5.2.1 “Affected party” (former ORS 240.086(2))
 - 5.2.2 Timeliness (see also 17.2 and 18.1)
 - 5.2.3 Pleading requirements
 - 5.2.4 Amendment of appeal letter
 - 5.2.5 Dismissal for lack of prosecution/failure to pursue appeal
- 5.3 Relationship to pending criminal prosecution

Chapter 6 – Affirmative Defenses

- 6.1 Alcoholism
- 6.2 Bad faith employer actions
- 6.3 Cooperation with government investigation
- 6.4 Denial of charges
- 6.5 Discipline inconsistent with employer’s prior practice
- 6.6 Discrimination – sex, race, religion, handicap, age
- 6.7 Employer awareness of workplace problem (see also 4.3)
- 6.8 Employer failure to provide training
- 6.9 First Amendment free speech
- 6.10 Off-duty conduct not subject to discipline
- 6.11 Physical or mental condition
- 6.12 Unlawful order (work now/grieve later doctrine)
- 6.13 Whistleblower statute
- 6.14 Work outside of position description
- 6.15 Other

Chapter 7 – Prehearing Practice

- 7.1 Depositions
- 7.2 Subpoenas

Chapter 8 – Hearing

- 8.1 Date of hearing
- 8.2 Bifurcation of hearing
- 8.3 Burden of going forward with evidence
- 8.4 Burden of proof
- 8.5 Burden of proving affirmative defenses
- 8.6 Motions (see also Chapter 16)
- 8.7 Post-hearing briefs
- 8.8 Recommended order
- 8.9 Objections to recommended order

Chapter 9 – Board and Appellate Court Review

- 9.1 Board review and order; reopening the record
- 9.2 Stay of order pending appellate court review
- 9.3 Review by appellate courts

Chapter 10 – Appeals of Actions Effective before July 1, 1981

- 10.1. ORS 240.555 and standard of review (see also 3.19)
- 10.2 Personnel actions
 - 10.2.1 Dismissal
 - 10.2.2 Constructive discharge
 - 10.2.3 Trial service removal
 - 10.2.4 Demotion
 - 10.2.5 Suspension
 - 10.2.6 Reduction in Pay
 - 10.2.7 Reprimand
 - 10.2.8 Transfer and assignment
 - 10.2.9 Layoff
 - 10.2.10 Allocation of position
 - 10.2.11 Changes in duties, authority or responsibility
 - 10.2.12 Position abolished/duties reassigned
 - 10.2.13 Application for classified employment
 - 10.2.14 Failure to accept application
 - 10.2.15 Restoration to classified service from unclassified service
 - 10.2.16 Implied resignation
 - 10.2.17 Failure to grant pay increase
 - 10.2.18 Performance appraisal
 - 10.2.19 Promotion procedure
 - 10.2.20 Other personnel actions
- 10.3 Appropriateness of personnel action

Chapter 11 – Classified Employees’ Appeals of Actions Effective on and after July 1, 1981: Employee Not Included in Bargaining Unit

- 11.1 ORS 240.555 and standard of review (see also 3.19)
- 11.2 Personnel actions
 - 11.2.1 Dismissal

- 11.2.2 Constructive discharge/discipline
- 11.2.3 Trial service removal
- 11.2.4 Demotion
- 11.2.5 Suspension
- 11.2.6 Reduction in pay
- 11.2.7 Reprimand
- 11.2.8 Transfer and assignment
- 11.2.9 Layoff
- 11.2.10 Classification/allocation of position
- 11.2.11 Changes in duties, authority or responsibility
- 11.2.12 Position abolished/duties reassigned
- 11.2.13 Application for classified employment
- 11.2.14 Failure to accept application
- 11.2.15 Restoration to classified service from unclassified service
- 11.2.16 Implied resignation
- 11.2.17 Failure to grant pay increase
- 11.2.18 Performance appraisal
- 11.2.19 Promotion procedure
- 11.2.20 Other personnel actions
- 11.3 Appropriateness of personnel action

Chapter 12 – Management Service Employment (effective July 1981)

- 12.1 ORS 240.570 and standard of review (see also 3.19)
- 12.2 Management service employee conduct expectations
- 12.3 Personnel actions
 - 12.3.1 Dismissal (see also 12.3.8)
 - 12.3.2 Constructive discharge/discipline
 - 12.3.3 Trial service removal
 - 12.3.4 Demotion within management service
 - 12.3.5 Removal from management service if “unable or unwilling” to perform (ORS 240.570(3))
 - 12.3.6 Removal from management service “due to reorganization or lack of work” (ORS 240.570(2) nondisciplinary removal/layoff)
 - 12.3.7 Removal from management service with restoration to classified service
 - 12.3.8 Removal from management service and discipline in classified service (see also 11.2)
 - 12.3.9 Suspension
 - 12.3.10 Reduction in pay
 - 12.3.11 Reprimand
 - 12.3.12 Transfer
 - 12.3.13 Assignment and reassignment
 - 12.3.14 Classification/allocation of position
 - 12.3.15 Performance appraisal
 - 12.3.16 Salary placement
 - 12.3.17 Other personnel actions
- 12.4 Conditional imposition of discipline
- 12.5 Appropriateness of personnel action

Chapter 13 – Cause for Discipline or Removal

- 13.1 Absence without leave
- 13.2 Absenteeism
- 13.3 Alcohol-related conduct
- 13.4 Assault
- 13.5 Complaint, failure to investigate/initiate
- 13.6 Complaint, filing with federal agency against state
- 13.7 Conduct, abusive/negative/interpersonal conflicts
- 13.8 Confidential information, release of
- 13.9 Conflict of interest
- 13.10 Criminal act
- 13.11 Document, falsification of
- 13.12 Drug-related conduct
- 13.12a Electronic systems (email, messaging, cell phones, personal computers, networks), misuse of (*this is a new topic heading in this Supplement*)
- 13.13 Ethics issues
- 13.14 Hiring procedure, violation of
- 13.15 Information, withholding of
- 13.16 Insubordination (see also 3.12)
- 13.17 Investigation, failure to cooperate/dishonesty in
- 13.18 Language, inappropriate
- 13.19 Leave without pay, unauthorized
- 13.20 Misrepresentation
- 13.21 Off-duty conduct
- 13.22 Property, failure to account for/safeguard
- 13.23 Property, misappropriation of
- 13.24 Property purchasing rules, violation of
- 13.25 Resident abuse
- 13.26 Security, failure to provide proper
- 13.27 Sex-related conduct
- 13.28 Sick leave, abuse of
- 13.29 Sickness, absence/unsatisfactory performance due to
- 13.30 Sleeping on the job
- 13.31 Tardiness
- 13.32 Vehicle-related conduct
- 13.33 Work break policy, abuse of
- 13.34 Work performance, loss of confidence in
- 13.35 Work performance, unsatisfactory
- 13.36 Other

Chapter 14 – Executive and Unclassified Service Employment

- 14.1 Layoff and restoration to classified service (see also Section 1.4)

Chapter 15 – Remedies

- 15.1 Make whole
- 15.2 Remand to employer for reconsideration of action
- 15.3 Attorney fees

15.4 Other remedies

Chapter 16 – Evidentiary and Other Rulings

- 16.1 Authenticity of documents
- 16.2 Collateral and equitable estoppel
- 16.3 Confidentiality
- 16.4 Credibility
- 16.5 Hearsay
- 16.6 Laches
- 16.7 Notice of imposition of discipline not appealed
- 16.8 Privilege
- 16.9 Relevance
- 16.10 Res judicata
- 16.11 Service of documents
- 16.12 Timeliness (see also 5.2.2)
- 16.13 Other
- 16.14 Legislative history
- 16.15 Statutory interpretation
- 16.16 Duty of good faith and fair dealing

Chapter 17 – Review/Enforcement of State Employee Arbitration Awards

- 17.1 Party entitled to challenge award
- 17.2 Timeliness
- 17.3 Pleading requirements
- 17.4 Scope of review

Chapter 18 – Temporary Employment

- 18.1 Timeliness of appeal
- 18.2 Rulings generally
- 18.3 Cases
- 18.4 Remedies

Chapter 19 – Workers Compensation Board Administrative Law Judges

- 19.1 Cases

Chapter 1 – Jurisdiction of ERB

1.2 Classified employees included in bargaining unit

Stigers v. Oregon Health Authority, Case No. MA-010-15 (May 2016): Appellant was in the management service and accepted a classified position in a bargaining unit in lieu of layoff. Among other arguments, Appellant contended that the layoff was not performed according to policy or the collective bargaining agreement, that she was paid less than she should have been, and that her classified position was inappropriately classified. Because ORS 240.560 and 240.570 do not permit appeal of those types of personnel actions, the Board declined to consider those assertions.

Epling v. Department of Human Services, Case No. MA-022-14 (February 2015): Appellant appealed his removal from trial service in a union-represented Office Specialist 2 position in the classified service. Under ORS 240.086(1), the Board does not have jurisdiction to hear appeals from employees in represented positions in the classified service. The Board dismissed the appeal for lack of jurisdiction.

Woosley v. Department of Agriculture, Case No. MA-012-13 (November 2013): Appellant appealed his removal from trial service as a classified agricultural worker. At the time of removal, Appellant worked in a union-represented position. Pursuant to ORS 240.086(1), the Board does not have jurisdiction to review personnel actions affecting employees who are in a certified or recognized bargaining unit. The Board dismissed the appeal.

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012): Project Manager 3 appealed her nondisciplinary removal from the management service and placement in a union-represented Project Manager 3 position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant asked the Board “to reclassify her current represented position, restore her previous salary level and reconsider her position’s duties and expectations.” With respect to employees in the classified service, the Board may “only review personnel actions that affect employees who are not in a certified or recognized bargaining unit.” Because Appellant’s position was in a bargaining unit, the Board dismissed the appeal for lack of jurisdiction.

Morin v. Department of Administrative Services, Case No. MA-020-12 (November 2012): Principal Executive Manager A appealed the reclassification of her position due to a reorganization to Accounting Technician 3, a classified represented position. The Board has no statutory authority to review whether a reclassification has resulted in the appropriate union-represented classification, citing *Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division*, Case No. MA-13-92 (May 1993), *recons* (June 1993),

rev'd and rem'd, 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). The Board dismissed the appeal for lack of jurisdiction.

Cook v. Oregon Housing and Community Services, Case No. MA-10-12 (July 2012): Program Analyst 1 appealed her removal. The limited duration agreement governing Appellant's appointment to the Program Analyst 1 position described her position as a "regular, classified position represented by the Service Employees International Union (SEIU)." The Board does not have authority under ORS 240.086(1) to review a personnel action affecting an employee who is "in a certified or recognized appropriate bargaining unit[.]" Because the agreement Appellant signed stated that she was hired into an SEIU-represented position, the Board dismissed the appeal for lack of jurisdiction.

Tucker v. Department of Human Services, Case No. MA-04-10 (May 2010): Classified service employee, who was a member of a bargaining unit represented by a labor organization and subject to the terms of a collective bargaining agreement, appealed his dismissal. The administrative law judge (ALJ) warned Appellant that the appeal would be dismissed for lack of jurisdiction unless Appellant convinced the ALJ to the contrary. When Appellant did not respond, the Board dismissed the appeal for lack of jurisdiction and lack of prosecution.

Neal v. State Operated Community Programs, Case No. MA-18-09 (October 2009): Classified service employee represented by a labor organization appealed her dismissal. The Board held that it does not have authority under ORS 240.086(1) to review personnel actions affecting an employee who is a member of a certified or recognized bargaining unit, and dismissed the appeal for lack of jurisdiction, citing *Parra v. Department of Fish and Wildlife*, Case No. MA-24-03 (November 2003).

1.3 Management service

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), *appeal pending*: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Among other arguments, Appellant alleged a violation of Department of Human Services rule 70.000.02. The Board held that it does not have jurisdiction over violations of agency rules, citing *Honeywell v. Department of Corrections*, Case No. MA-014-10 (February 2011); *Payne v. Dept. of Commerce*, 61 Or App 165, 174, 656 P2d 361 (1982).

Jackson v. Business Development Department, Case No. MA-002-16 (May 2016): Principal Executive Manager F appealed his performance rating on his performance evaluation. ORS 240.570(4) identifies the types of personnel actions over which the Board has jurisdiction. Performance evaluations are not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016): Pursuant to ORS 240.570(2), Principal Executive Manager E appealed her removal from the management service as a result of a reorganization and layoff. Appellant was restored to a classified position, resulting in a reduction in salary. Among other arguments, Appellant sought to appeal the loss in salary resulting from her placement in a position in a lower salary range. Appellant's challenge to the loss of salary "is not a management service personnel action listed in ORS 240.570, and this Board does not have 'authority to set aside or modify a personnel action that is in violation of a personnel rule,'" citing *Knutzen v. Dept. of Ins. and Finance*, 129 Or App 565, 569, 879 P2d 1335 (1994). The Board dismissed the appeal.

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution appealed a written reprimand and removal from the Tactical Emergency Response Team, resulting in loss of a four percent pay differential. Appellant received the discipline during Appellant's management service promotional trial service. Due to the issuance of discipline, Appellant was removed from management trial service and returned to the rank of sergeant. The Board noted that the removal from management trial service itself could not be (and was not) appealed, citing *Tucker v. Department of Human Resources*, Case No. MA-06-11 at 2 (September 2011). The Board dismissed the appeal.

Weston v. Oregon Health Authority, Case No. MA-015-15 (November 2015): Principal Executive Manager D with the Oregon Health Authority appealed the abolishment of her position as a result of a reorganization at the Oregon Health Authority. The reorganization resulted in Appellant's placement in an Operations and Policy Analyst 3 position in the classified service. Appellant did not challenge the removal itself. Instead, Appellant challenged the reduction in salary resulting from her placement in a classified service position. Reduction in salary as a result of placement in the classified service is not one of the management service personnel actions listed in ORS 240.570 that can be appealed to the Board. The Board dismissed the appeal for lack of jurisdiction.

Moll v. Parks and Recreation Department, Case No. MA-009-13 (October 2013), recons (December 2013): Appellant appealed his restoration to the classified service after removal from the management service, arguing that he should have been demoted from his prior position but not removed from the management service. Appellant held a regular status classified service position, and subsequently was appointed to the management service as a Park Manager 1. Appellant successfully completed the trial service period and attained regular status. Appellant was subsequently promoted to a Park Manager 2 position, subject to a trial service period. During this trial service period, the Department removed Appellant from management service pursuant to ORS 240.570(3) and restored him to the classified position. (The Department did not remove Appellant from trial service pursuant to ORS 240.410.) Appellant did not contest the basis for his removal from the management service, but argued that he was entitled to be returned to his previous management service Park Manager 1 position because he was removed during the trial service period. The Board rejected this argument. The Department could, and did, remove Appellant from the management service pursuant to ORS 240.570(3) during trial service. When a

management service employee with immediate prior regular status in the classified service is removed from the management service, the employee is returned to his last regular status position in the classified service. The Board rejected Appellant's argument that a regular status employee cannot be removed from the management service pursuant to ORS 240.570(3) during trial service because it lacked any supporting legal authority. The Board dismissed the appeal.

Culver v. Department of Human Services for Aging and People with Disabilities, Case No. MA-002-13 (May 2013): Appellant appealed his removal from management trial service. The Board has consistently held that it has no authority to review appeals from management service employees who are removed during trial service. The Board dismissed the appeal.

Wilaby v. Oregon Military Department, Case No. MA-039-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant sought restoration of her vacation accrual rate and a one-half step salary increase. Appellant's position was changed pursuant to House Bill 2020, which required certain state agencies to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work, and therefore the Board dismissed the appeal for lack of jurisdiction.

Albertson v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-036-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant sought restoration of her vacation accrual rate and a one-half step salary increase. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work, and therefore the Board dismissed the appeal for lack of jurisdiction. For other opinions stating the same conclusion, see also *Holton v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-037-12 (January 2013); *Hill v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-035-12 (January 2013); *Shoff v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-034-12 (January 2013); *McMillion v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-033-12 (January 2013); *Maceira-Klever v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-032-12 (January 2013).

Harper v. Oregon Parks and Recreation Department, Case No. MA-029-12 (November 2012): Safety Specialist 2 appealed a nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that her position warranted a management service classification, and that the change of classification created "an inconsistency with other state agency positions performing the same work" and harmed her and the work unit. ORS 240.570 "does not provide for an appeal regarding

either the change in position status or the designation of one's position as management or classified service." The Board dismissed the appeal for lack of jurisdiction.

Nichols v. Oregon Health Authority, Oregon State Hospital, Case No. MA-030-12 (November 2012): Executive Support Specialist II appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that she could not "perform the duties of her position as a classified represented employee." Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. Instead, she was removed due to "OHA's determination that her position status did not warrant remaining in the management service." The Board dismissed the appeal for lack of jurisdiction.

Brosmore v. Oregon Youth Authority, Case No. MA-027-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

True v. Oregon Youth Authority, Case No. MA-026-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012): Project Manager 3 appealed her nondisciplinary removal from the management service and placement in a union-represented Project Manager 3 position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant asked the Board "to reclassify her current

represented position, restore her previous salary level and reconsider her position's duties and expectations." Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

Morin v. Department of Administrative Services, Case No. MA-020-12 (November 2012): Principal Executive Manager A appealed the reclassification of her position due to a reorganization to Accounting Technician 3, a classified represented position. The Board has no statutory authority to review whether a reclassification has resulted in the appropriate union-represented classification, citing *Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division*, Case No. MA-13-92 (May 1993), *recons* (June 1993), *rev'd and rem'd*, 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). The Board dismissed the appeal.

Tucker v. Department of Human Services, Case No. MA-06-11 (September 2011): Principal Executive Manager D appealed his removal during trial service and restoration to classified service. Appellant contended that his removal violated the Department handbook, management service policy, the Oregon Revised Statutes, and federal constitutional protections. The Board dismissed, holding that it had no authority to review appeals from management service employees who are removed during a trial service period that has been established pursuant to rules enacted under ORS 240.250. The Board cited numerous Board decisions, including *Taylor v. Department of Corrections*, Case No. MA-04-00 at 3 (May 2000).

Miller v. Department of Human Services, Seniors and People With Disabilities, Case No. MA-10-10 (April 2011): Principal Executive Manager B appealed the Department's refusal to allow her to rescind her resignation. The Board held that, pursuant to ORS 240.570(2), it had no jurisdiction over the Department's refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. Appellant alleged that the Department misled her about the amount of family leave (pursuant to the Family and Medical Leave Act (FMLA)) to which she was entitled, transferred her into a position in which she supervised fewer employees, and required her to begin her work day at a time that interfered with her child care arrangements. These allegations were insufficient to demonstrate that (1) the Department deliberately created or deliberately maintained intolerable working conditions, (2) with the intention of forcing Appellant to leave, and (3) Appellant left work because of these working conditions, the standard the Board requires to demonstrate that a resignation constitutes a constructive discharge.

Honeywell v. Department of Corrections, Case No. MA-014-10 (February 2011): Department manager appealed the Department's refusal to hire her into a Chief Investigator position after her position was eliminated. The Board held that it lacked jurisdiction over the appeal because a refusal to hire was not a personnel action listed in ORS 240.570(2). The Board also held that, for the same reason, it had no jurisdiction over alleged inconsistent hiring and promotion practices. Finally, the Board held that it had no power to grant the remedy the Appellant sought

(ordering the Department to hire her) because the Board only had the power to order reinstatement or reemployment without loss of pay, citing ORS 240.560(4).

Hogstad v. Marion County, Case No. MA-18-10 (January 2011): A Marion County Facilities Manager appealed his dismissal, and then failed to respond to a letter from the administrative law judge (ALJ) asking the employee to withdraw his appeal or show cause why it should not be dismissed. The Board dismissed the appeal because (1) the Board lacked jurisdiction over appeals from individuals who were not employees of the State of Oregon pursuant to ORS 240.015(19) (defining state service) and ORS 240.560 (setting out process for appeals from those in state service), and (2) Appellant's failure to respond to the ALJ's letter constituted a failure to prosecute.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on paid administrative leave and subsequently suspended for one week and demoted within the management service. The Board wrote that Appellant "did not appeal the Department's decision to place her on administrative leave and, even if she had, we do not have jurisdiction to consider such an appeal."

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): A management service employee appealed his reprimand for writing an email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. The employee printed the email. The printed copy became intermixed with other documents and was discovered by a targeted colleague who brought the email to management's attention. The Department then disciplined the employee by issuing a letter of reprimand. The Department moved to dismiss the appeal, arguing that the Board lacked jurisdiction. The Board determined that it had jurisdiction over reprimands, citing *Carter v. Department of Corrections*, Case No. MA-12-99 (September 2001).

1.4 Unclassified service

Matheson v. Secretary of State, Case No. MA-009-14 (June 2014): Appellant alleged that she was improperly dismissed from her position as an executive assistant with the Oregon Secretary of State, a position in the unclassified service, and subsequently provided a 90-day limited duration position with the Oregon Department of Transportation. Appellant asked that her permanent status with the state be restored. The Board dismissed the appeal because (1) the Board lacks jurisdiction over termination appeals from an unclassified executive service position, and (2) the appeal was filed more than 30 days after Appellant's release from the Secretary of State.

1.5 Temporary service (see also chapter 18)

Christensen v. Department of Administrative Services, Case No. MA-6-09 (April 2009): Temporary employee appealed her termination but failed to respond to the administrative law judge's dismissal warning letter. The Board dismissed the appeal for lack of prosecution.

1.7 Applicant for employment

Honeywell v. Department of Corrections, Case No. MA-14-10 (February 2011): Department manager appealed the Department's refusal to hire her into a Chief Investigator position after her position was eliminated. The Board held that it lacked jurisdiction over the appeal because a refusal to hire was not a personnel action listed in ORS 240.570(2). The Board also held that, for the same reason, it had no jurisdiction over alleged inconsistent hiring and promotion practices. Finally, the Board held that it had no power to grant the remedy the Appellant sought, ordering the Department to hire her, because the Board only had the power to order reinstatement or reemployment without loss of pay, citing ORS 240.560(4).

1.9 Civil rights, Americans with Disabilities Act (ADA), and other laws

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was arrested and charged with driving under the influence of intoxicants (DUII). Appellant did not disclose the arrest to management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Among other defenses, Appellant argued that her dismissal violated ORS 659A.112 *et seq.* (disability discrimination), 659A.183 (retaliation under the Oregon Family Leave Act), and 659A.865 (retaliation for filing a BOLI complaint). The Board does not have jurisdiction under these statutes, and therefore did not consider these defenses. Appellant also argued that ODOT failed to accommodate her alcoholism, and the Board declined to consider the merits of this argument under the Americans with Disabilities Act because determinations of disability and reasonable accommodation are within the express authority of other federal and state agencies, citing *McCoy v. Department of Transportation*, Case No. MA-8-02 (January 2003). The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant argued, among other things, that his removal violated ORS 659A.203, the public employee whistleblower statute. The Board declined to consider Appellant's argument because the Board does not have jurisdiction to hear appeals alleging violations of ORS 659A.203. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-007-10 (December 2010): Management service employee, the Regional Manager for Maintenance and Operations, appealed her reassignment from Region 1 (representing the Portland metro area) to Region 2 (representing the Salem metro area). Appellant was reassigned from Region 1 on the same day as another employee with whom she had experienced a protracted hostile relationship. The conflict had been so significant that it negatively affected the working operations of Region 1. Both employees had filed hostile work environment claims against the other, with Appellant filing the most recent before the reassignments. Among other arguments, Appellant alleged that the Department violated her rights under ORS 659A.199 and ORS 659A.203(1)(b)(A) and (B), the whistleblower statutes. The Board wrote that the appropriate venue for these allegations is “the Bureau of Labor and Industries or through a civil action in state or federal courts. This Board does not have jurisdiction to hear complaints of this nature and, consequently, we will not address these arguments further.”

1.11 Oregon State System of Higher Education employees

Pasco v. Portland State University, Case No. MA-15-12 (July 2012): Employee appealed his termination by his employer, Portland State University (PSU). Pursuant to ORS 351.086(1), the provisions of ORS Chapter 240 do not apply to the Oregon University System. PSU is part of the Oregon University System. The Board dismissed the appeal for lack of jurisdiction.

Chapter 2 – Relationship to Constitution

2.1 Fourteenth Amendment due process clause (see also 4.1)

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), *appeal pending*: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list (and ultimately did so). Appellant argued that the Department’s acceptance of the Brady listing (which resulted in dismissal because she was unable to perform the litigation-related functions of her job) effectively deprived her of due process of law because she was unable to contest the district attorney’s decision. The Board rejected this argument. “The Department’s duty was to provide due process to Appellant regarding its decision to terminate her employment, not to make certain that Appellant received due process from the DA’s office.” The Board dismissed the appeal.

Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016): Appellant, a Principal Executive Manager D and a section manager for the Oregon Medical Marijuana Program, appealed her removal from the management service as a result of a reorganization and layoff at the Oregon Health Authority (OHA). In her appeal, Appellant incorrectly stated her email address. Appellant did not respond to the administrative law judge’s (ALJ) request to provide hearing dates. The ALJ set the hearing for October 15. Eventually, after being contacted by the Board’s Hearings

Assistant by telephone, Appellant informed the Hearings Assistant that she could not attend a hearing on October 15. The Hearings Assistant advised Appellant to contact OHA's counsel. Appellant did so. OHA objected to postponing the October 15 hearing. The hearing occurred on October 15. At the hearing, Appellant stated that she had consulted an attorney who would represent her if the hearing were postponed. The ALJ postponed the hearing at Appellant's request. Appellant's counsel subsequently informed OHA's counsel and the ALJ that Appellant had consulted him, that Appellant wished to represent herself at the hearing, and that she was available for hearing on December 7. The ALJ held the remainder of the hearing on December 7. The Board held that the ALJ properly continued the October 15 hearing consistent with the Board rule on postponements and the requirements of due process, citing *Van Dyke v. Department of Fish and Wildlife*, Case No. MA-6-01 (November 2002).

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014): Training and Development Specialist 2 with the Oregon State Police (OSP) appealed her removal from the management service. Appellant began her state employment at Oregon Youth Authority in a classified position. She then worked in the Secretary of State's office, in a position designated as classified, unrepresented. Subsequently, Appellant was promoted into a management service position at OSP. OSP developed concerns about Appellant's work performance and conducted an investigation. In a pre-disciplinary letter, OSP informed Appellant that it was considering removing her from the management service under ORS 240.570(3). As OSP understood Appellant's restoration rights, she would not be returned to the classified service, but OSP's letter did not inform her that removal from management service would terminate her state service. During the pre-removal meeting, Appellant submitted a written response to the allegations against her. Appellant referred to the proposed action as a "proposed demotion." Her attorney also referred to the proposed action as a "potential demotion." OSP did not notify Appellant that it believed that her removal from the management service would terminate her state employment. Appellant was not afforded procedural due process as required by the Fourteenth Amendment to the United States Constitution, and therefore her removal from the management service and resulting termination from state service was invalid. Appellant had a constitutionally significant property interest in her continued state employment. In addition to a full post-removal/dismissal hearing, Appellant was entitled to pre-removal/dismissal safeguards including: (1) notification of the charges against her, (2) notification of the kinds of sanctions being considered, and (3) at least an informal opportunity to refute the charges either orally or in writing before someone authorized to make or recommend a final decision. Although the first and third safeguards were satisfied, OSP did not notify Appellant that the possible sanctions included the end of her state service. The Board was not persuaded by OSP's argument that a due process violation may be excused if the employee does not subsequently come forward with compelling evidence or argument that the employee would have offered if the employee had known about the true but undisclosed sanction. Where a termination is invalid due to a failure to comply with the due process clause of the Fourteenth Amendment, the proper remedy is reinstatement and an award of back pay and other benefits.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was suspended for one week without pay and demoted within the management service. The initial disciplinary letter did not provide Appellant with the opportunity for a pre-disciplinary meeting. The Department rescinded the disciplinary letter and reissued a new one that was identical except that it offered the opportunity for a pre-disciplinary meeting. The Board held that the Department cured the procedural defect and its initial failure to provide a pre-disciplinary meeting did not support Appellant’s contention that the discipline was pretextual.

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): Management service employee appealed his reprimand for writing an email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. The employee printed the email. The printed copy became intermixed with other documents and was discovered by a targeted colleague who brought the email to management’s attention. The Department then disciplined the employee by issuing a letter of reprimand. The Department did not include any notice of appeal rights in the disciplinary letter and it incorrectly cited to just cause standards, rather than the statutory standards applicable to management service employees. Appellant raised these deficiencies as due process issues and also argued that he was not given adequate specificity of the charges and a reasonable opportunity to present mitigating facts and circumstances. The Board determined that the failure to provide the appeal rights was harmless error because the Appellant had timely appealed. The Board also determined that the appointing authority has no statutory duty to inform employees of appeal rights, citing *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977). Finally, the Board determined that Appellant had sufficient notice, given that a reprimanded employee is not deprived of a property interest. Therefore, due process is satisfied by a written notice of the discipline that includes the supporting facts and statutory grounds, which was met in this case.

Chapter 3 – Terms and Definitions

3.3 “Appeal” – ORS 240.560(1)

Marshall v. Oregon Health Authority, Case No. MA-31-12 (December 2012): Employee appealed his removal from the management service due to a reorganization, effective July 31, 2012. On August 22, 2012, Appellant sent an email to the Board in which he wrote that he believed the elimination of his position was handled poorly and possibly unlawfully and that he believed he had been retaliated against. Appellant also wrote that he was “a little confused about how to proceed with a possible complaint.” A Board employee responded by email the same day and directed Appellant to information on the Board’s web site about how to file an appeal. On October 24, 2012, Appellant submitted an appeal, 85 days after the effective date of the layoff. In response to an inquiry from the administrative law judge to show cause why the appeal should not be dismissed, Appellant contended that his August 22 email should be considered by the Board as an appeal. The August 22 email was not an appeal—it simply asked for information and advice about a “possible” appeal. Moreover, Appellant was aware that the Board employee interpreted

his August 22 email as only a request for information. The Board dismissed the October 24 appeal as untimely.

3.7 “Constructive discharge/discipline” (see also 10.2.2, 11.2.2, 12.3.2)

Miller v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-010-10 (April 2011): Principal Executive Manager B appealed the Department’s refusal to allow her to rescind her resignation. The Board held that, pursuant to ORS 240.570(2), it had no jurisdiction over the Department’s refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. To establish a constructive discharge, the appellant must prove (1) that the employer deliberately created or deliberately maintained the working conditions, (2) with the intention of forcing the employee to leave the employment, and (3) that the employee left the employment because of the working conditions. The working conditions that spark the constructive discharge must be so intolerable that a reasonable person in the employee’s position would have resigned, citing *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), and *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995). See also *Holley v. Department of Environmental Quality*, Case Nos. MA-9/13-89 (April 1990). Appellant alleged that the Department misled her about the amount of family leave to which she was entitled (pursuant to the Family and Medical Leave Act (FMLA)), transferred her into a position in which she supervised fewer employees, and required her to begin her work day at a time that interfered with her child care arrangements. The Board determined that these allegations were insufficient to demonstrate that the Department deliberately created intolerable working conditions with the intention of forcing Appellant to leave or that Appellant left work because of these conditions.

3.9 “For the good of the service” – ORS 240.316(4), 240.570(2)

Keller v. Department of Transportation, Case No. MA-007-10 (December 2010): Management service employee, the Regional Manager for Maintenance and Operations, appealed her reassignment from Region 1 (representing the Portland metro area) to Region 2 (representing the Salem metro area). Appellant was reassigned from Region 1 on the same day as another employee with whom she had experienced a protracted hostile relationship. The conflict had been so significant that it negatively affected the working operations of Region 1. Both employees had filed hostile work environment claims against the other, with Appellant filing the most recent before the reassignments. Appellant claimed that her reassignment was retaliatory due to her complaint. Determining whether an assignment, reassignment, or transfer of a management service employee was for the “good of the service,” as provided in ORS 240.570(2), turns on whether the action was arbitrary. To determine whether the action was arbitrary, the Board examines whether the action “was supported by substantial evidence, i.e., whether there was some rational basis for the agency action,” quoting *Rau v. Department of Parks and Recreation*, Case No. MA-2-01 (January 2002). The Board determined that the Department established that the reassignment was for the good of the service because there was a rational basis for the Department’s action. The Board determined that despite the Department’s repeated efforts to facilitate reconciliation,

Appellant and the other employee had a disruptive effect on other employees, interrupting the flow of communications regarding maintenance operations.

3.11 “Inefficiency” – ORS 240.555

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant’s job duties involved determining applicants’ eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (see *Schafer v. Department of Human Services*, Case No. MA-14-09 (June 2010)). Appellant obtained the information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Among other charges, the employer charged Appellant with inefficiency. Inefficiency is “the quality of being incapable or indisposed to do that which an employee is required to do,” quoting *Bosserman v. Department of Environmental Quality, Air Quality Division*, Case No. MA-29-85 at 24 (December 1986). Here, Appellant was “indisposed” to keep agency information confidential, seek appropriate authorization to disclose information to third parties, and obtain supervisory guidance when he had doubts about whether certain information should be provided. In addition, Appellant demonstrated an inability to comply with the employer’s policies when he used his state computer to engage in a personal family dispute and sent an offensive email message to his niece. The employer met its burden to prove inefficiency.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew that other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. Among other charges, the Department charged Appellant with inefficiency. “Inefficiency is the quality of being incapable or indisposed to do that which an employee is required to do,” citing *Bosserman v. Department of Environmental Quality, Air Quality Division*, Case No. MA-29-85 at 24 (December 1986). The Board concluded that the Department proved the charge of inefficiency because Appellant was “unable to perform a basic function of his position, submitting accurate time records, when he had the responsibility of overseeing that work when performed by other Camp employees.” The Board dismissed the appeal.

3.12 “Insubordination” – ORS 240.555

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. Appellant sent multiple offensive instant message communications over the Department’s electronic systems, despite previous counseling and two previous disciplinary actions for sending disrespectful and demeaning messages over the Department’s electronic systems. The Department charged Appellant with insubordination, among other charges. Insubordination requires a refusal to obey a direct and lawful order. The Board concluded that Appellant’s conduct did not constitute insubordination, although it did constitute misconduct. Appellant’s conduct of willfully violating a workplace *policy* was more akin to misconduct, which the Board found was established, than to insubordination. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on administrative leave pending an investigation of a complaint she had made against coworkers. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but the instructions did not specifically tell her that she was also required to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not respond to emails from management about the project’s progress. The Department charged Appellant with insubordination and suspended Appellant for one week. The Board determined that Appellant had engaged in “unacceptable behavior” in failing to complete the project; however, the Department failed to prove a charge of insubordination because the Department did not warn Appellant that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand in place of the suspension letter.

3.13a “Malfeasance” – ORS 240.555 [*Note: this is a new numbered topic entry in this Supplement*]

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his

romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Department properly removed Appellant from the management service, but not from the classified service. Defining malfeasance for the first time for purposes of ORS 240.555, the Board wrote that “the State is required to prove more than mere misconduct; it is required to show that the employee acted under color of the employee’s office to do something that the employee specifically agreed or contracted not to do. Further, the conduct must be contrary to law.” The Board held that Appellant’s conduct did not constitute malfeasance because there was no evidence that he used his public position to gain favors or personal considerations for his partner or to grant his partner favors or unwarranted benefits. Appellant did not, therefore, take unwarranted or illegal action under the color of the authority of his office. Although Appellant committed misconduct, the Board ordered the Department to reinstate Appellant to the classified service in light of his length of state service and lack of previous discipline.

3.14 “Misconduct” – ORS 240.555

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff’d without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant’s subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious “male gay black lover” of EL, changing EL’s computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL’s car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly dismissed Appellant from the classified service, despite his length of service and no prior discipline. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Misconduct is a “transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, willful in character, improper or wrong behavior,” citing *Mabe v. Department of Corrections*, Case No. MA-09-09 at 26 (July 2010). Appellant relied only on his assertion that he “didn’t know what to do.” This “level of fecklessness, without a credible or meaningful explanation, was a willful dereliction of his duties and constituted willful, intentional actions” and was misconduct. The Board dismissed the appeal.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. Appellant sent multiple offensive instant message communications over the Department’s electronic systems, despite previous counseling and two previous disciplinary actions for sending disrespectful and demeaning messages over the Department’s

electronic systems. The Department charged Appellant with misconduct, among other charges. Misconduct requires a “transgression of some established and definite rule of action * * * *willful in character*, improper or wrong behavior,” quoting *Mabe v. Department of Corrections*, Case No. MA-09-09 at 26 (July 2010). The Board rejected Appellant’s argument that her conduct did not constitute intentional wrongdoing because she believed that her instant messages were “private” and not proscribed by the Department’s policies. Appellant was aware that the Department’s policies prohibited using its electronic systems to send unprofessional or disrespectful messages, and she had recently been disciplined for “nearly identical conduct.” The Board concluded that Appellant “was aware of the pertinent policies and intentionally sent the intended messages. That is sufficient to establish misconduct.” The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Hired in 1986, Appellant was promoted to management service in 1992. Appellant was a Region Maintenance and Operations Manager in ODOT’s highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 (before she was promoted to the management service) and again in 2008, when her driver’s license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver’s license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Under the Board’s cases, misconduct is a “transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior,” and that involves “intentional wrongdoing.” Appellant’s conduct constituted misconduct because it was unlawful, and the result of willful, intentional actions. The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Department properly removed

Appellant from the management service, but not from the classified service. Once Appellant entered into a committed romantic relationship with a subordinate, he committed misconduct by not disclosing that relationship because, at that point, Appellant knew that the relationship posed a potential conflict of interest and knew that the Department's Conflict of Interest Policy required reporting of potential, in addition to actual, conflicts of interest. Although Appellant committed misconduct, the Board ordered the Department to reinstate Appellant to classified service in light of his length of state service and lack of previous discipline.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from the management service and dismissal from state service. The Board dismissed the management-service appeal, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. In dismissal cases, the Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances such as prior discipline, length of state service, whether the employee was warned, the magnitude of the action(s), and the likelihood of repeated misconduct, citing *Smith v. Department of Transportation*, Case No. MA-4-01 (June 2001). Misconduct includes actions that strike at the fabric of the employer-employee relationship, such as stealing, striking a superior, and persistent insubordination. Appellant had 14 years of state service and no prior discipline. Furthermore, the evidence that she personally harbored discriminatory opinions was credibly disputed by several witnesses. Appellant's testimony indicated that she understood the nature of her mistakes and could correct them. Appellant's conduct was not so serious that mitigating circumstances could be ignored. A key element in the rationale behind progressive discipline is that it gives an employee the opportunity to correct behavior, citing *Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program*, MA-10-09 at 19 (November 2010).

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant's job duties involved determining applicants' eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (*see Schafer v. Department of Human Services*, Case No. MA-14-09 (June 2010)). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Among other charges, the employer charged Appellant with misconduct. Misconduct is a "transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior . . . For purposes of ORS 240.555 'misconduct' involves intentional wrongdoing," quoting *Schellin v. Department of Veterans' Affairs*, Case Nos. 1381/1384 (March 1983). The employer proved that Appellant intentionally obtained and shared information from a confidential database with an agency outsider

in order to do a favor for a friend, and that he knew it was wrongful to do so. Further, Appellant was not forthcoming about his reasons for sharing the information. Appellant committed misconduct by willfully violating agency policies regarding disclosure of confidential information.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. Among other charges, the Department charged Appellant with misconduct. Misconduct is “a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior . . . For purposes of ORS 240.555 ‘misconduct’ involves intentional wrongdoing,” citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied* (September 2006). The Department proved the misconduct charge because it “proved that Mabe intentionally made numerous untruthful statements, contrary to Department policy and rules.” The Board dismissed the appeal.

3.17 “Political reasons” – ORS 240.560(3)

Stigers v. Oregon Health Authority, Case No. MA-010-15 (May 2016): Appellant was in the management service and accepted a classified position in a bargaining unit in lieu of layoff. Among other challenges to the layoff, Appellant argued that the layoff was “conducted for political reasons.” The Board concluded that Appellant “has not developed that theory in detail and has ultimately failed to produce any compelling evidence to substantiate it.” The charge was therefore too speculative. The Board dismissed the appeal.

3.17a “Progressive discipline”

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), *aff’d without opinion*, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. Hired into the classified service in 1999, Appellant was promoted to the management service in 2001. One of Appellant’s subordinates, EL, a classified employee, was harassed by another classified employee. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve

human resources or upper management. The employer properly removed Appellant from the management service and dismissed Appellant from the classified service, despite his length of service and no prior discipline. A reasonable employer is one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. A reasonable employer "applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures." The Board noted that earlier Board cases used the word "gross" in describing this standard (as in "an employee's offense is gross"). The Board explained that the updated phrasing of the standard is intended only to eliminate the outdated use of the word "gross." The new phrasing "does not change our test—*i.e.*, some employee actions justify dismissal even where no prior discipline has been imposed." The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Hired in 1986, Appellant was promoted to management service in 1992. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 (before she was promoted to the management service) and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. The Board rejected Appellant's argument that ODOT's decision to forego discipline for the 2008 incident precluded dismissal for a repeat infraction in 2011. One of the primary purposes of progressive discipline is to give an employee the opportunity to correct behavior. Although ODOT did not impose discipline in 2008, it did afford Appellant the opportunity to correct her behavior because she was "put on notice that such conduct was not consistent with the mission of the agency or the agency's expectations of her as an employee," which she had acknowledged by committing not to repeat the conduct. The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the management-service appeal, but granted Appellant's challenge of her dismissal from state service, which was based on misconduct. The Board reached its conclusion, in part, by concluding that a reasonable employer would have used progressive discipline. The Board explained that a key element in the rationale behind progressive discipline is that it gives an employee the opportunity to correct his or her behavior, citing *Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program*, MA-10-09 at 19

(November 2010). Here, Appellant's testimony indicated that she understood the nature of her mistakes and could correct them. Appellant's conduct was not so serious that mitigating circumstances could be ignored.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed the case, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board also determined that the level of discipline was objectively reasonable despite Appellant's agency work since 2003 without previous discipline—because of Appellant's preferential treatment of his personal friend, the volume of non-business related emails, the content of the emails (together reflecting a gross disregard of the agency's policies), and the similar discipline meted out in a comparable situation. The Board was also troubled by Appellant's lack of understanding of his obligations as a manager because, during the investigation, the agency gave Appellant multiple opportunities to respond to the charges, but Appellant refused, or was unable, to recognize that he did anything wrong. The Board concluded that Appellant's responses made it unlikely that his conduct would be improved by lesser progressive discipline.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Appellant had no disciplinary record, and argued that the Department was required to use progressive discipline before dismissing him. The Board acknowledged that a "reasonable employer utilizes progressive discipline except when the employee's offense is gross or the employee's behavior would not be improved by progressive measures," citing *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994). Appellant's "deceptiveness in an area where he appears to have believed no one would notice, would reasonably give an employer pause to place him in a position of trust with inmates." The Board concluded that Appellant's misconduct was severe and would not be improved by progressive discipline. Thus, the lack of lesser discipline before termination did not preclude dismissal. The Board dismissed the appeal.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was suspended for one week without pay and demoted within the management service. The demotion was due to Appellant's conduct during a meeting where she was demeaning, critical and dismissive to other staff members, including her subordinates. The Board determined that the Department proved both the charges. However, the Board determined that the level of discipline was not reasonable because the Department had failed to consider the principles of progressive discipline. Discipline is progressive if it involves "corrective measures that put the employee on notice that further misconduct may result in the discipline ultimately imposed and that gives the employee a

reasonable opportunity to modify his behavior,” quoting *Oregon School Employees Association, Chapter 89 v. Rainier School District 13*, Case No. UP-85-85, 9 PECBR 9254, 9279 (1986). The Board ordered the Department to convert the permanent demotion to a temporary one of two months.

3.19 “Reasonable employer” (see also 11.1 and 12.1)

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff’d without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. Hired into the classified service in 1999, Appellant was promoted to the management service in 2001. One of Appellant’s subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious “male gay black lover” of EL, changing EL’s computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL’s car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service and dismissed him from the classified service, despite his length of service and no prior discipline. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. A reasonable employer is one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee’s length of service and service record. A reasonable employer also “administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee’s behavior probably will not be improved through progressive measures.” Applying those principles, the Board determined that the employer’s discipline was reasonable. Therefore the Board dismissed the appeal.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant’s knowledge of OIB’s ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director’s predecessor. The Board concluded that there was some merit to both parties’ positions, but that an objectively reasonable employer would not have removed

Appellant from the management service for her actions regarding the lease, given Appellant's positive employment history. To varying degrees, the Commission proved some of the remaining charges, but failed to prove others. Appellant's removal violated ORS 240.570(3). Appellant had been employed for approximately seven years without any disciplinary action. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager D appealed his removal from the management service and return to the classified service. The Department acted as a reasonable employer. The Board wrote that, in applying the "reasonable employer" test, it "is not for us * * * to consider all [of] the options open to the employer and select the best among them as a mandate," quoting *Hagenauer v. Department of Agriculture, Livestock Division*, Case No. MA-13-87 at 7 (February 1988). Rather, so long as the course of action chosen by the employer is reasonable, the Board will sustain it. The Board also reiterated that, "in the context of a management service removal, the burden of justifying removal is 'relatively minor' and we give weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion." The Board dismissed the appeal.

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department's Fiscal Manager, appealed a one-week unpaid suspension for poor performance. Hired in 2003, Appellant received two letters of reprimand (in 2008 and in 2010), received "needs improvement" ratings on two performance evaluations, and received written expectations and a work plan for inaccurate work and inattention to detail. Appellant (a) submitted a permanent finance plan for a reclassified position that contained significant errors, (b) submitted a financial year-end report/subrecipient report that she knew was likely to contain errors, (c) failed to follow up on the filing of a required quarterly report under the American Recovery and Reinvestment Act of 2009, and (d) gave her supervisor inaccurate information regarding accounts receivable and forfeited vehicles out of haste and ignorance. Some of Appellant's errors were "minor and unique," but others were examples of multiple failures to submit accurate information when accuracy was important. Viewing Appellant's actions in total, "against the background of her previous direction and reprimands," the Board concluded that "an objectively reasonable employer could have issued a one-week suspension under these circumstances." The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000

without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. Appellant argued that he should receive counseling or a lower level of progressive discipline. The employer's decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer's contracting function, which Appellant had committed to help the employer regain. Appellant's "failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility." Also, Appellant's actions "severely damaged the Department's ability to trust his judgment." Appellant failed to understand the nature and seriousness of his conduct, and the fact that his "failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards." The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the management-service appeal, but granted Appellant's challenge of her dismissal from state service, which was based on misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. The Board applied a "reasonable employer" standard, which involves an objective evaluation of all circumstances of the removal or dismissal to determine whether the employer's action was objectively reasonable, citing *Brown v. Oregon College of Education*, 52 Or App 251, 260-61, 628 P2d 410 (1981). 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," quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). Applying the reasonable employer standard, the Board scrutinizes a dismissal from state service more stringently and under rules that are substantially different from those governing removal from management service. Charges that are adequate to support removal from management service may not be sufficient to justify dismissal from state service. With two of the three allegations proven, the Board considered whether Appellant was properly removed from management service based on the "no reasonable employer" standard. A manager is held to high standards, although those standards must not be arbitrary or unreasonable. Nevertheless, a removal from management service may be based on a single proven charge. Here, Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." The Board dismissed the appeal with regard to Appellant's removal from management service.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. A reasonable employer is one who disciplines employees in good faith and for cause. The employer must demonstrate that the level of discipline imposed was objectively reasonable. A reasonable employer imposes sanctions that are proportionate to the offense; considers the employee's length of service and service record; and applies the principles of progressive discipline. However, a reasonable employer may not be required to use progressive discipline "where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," citing *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (April 1993). In applying the "objectively reasonable" standard to management service discipline cases, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable, citing *Helper v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a manager has been compromised. Board precedent also gives weight to the effect of the employee's actions on the mission and the image of the agency and the extent to which those actions reflect the proper use of judgment and discretion, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service for an inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board concluded that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. 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 when the offense is gross," quoting *Bellish v. Department of Human Service, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (2004), *recons* (June 2004). In the case of an "employee with law enforcement responsibilities, an employer can reasonably expect that the employee will avoid conduct that would place their personal integrity in question or bring discredit on their commission as a law enforcement officer," citing *Duncan v. Department of Agriculture*, Case No. MA-01-91 (1992), and *Hunter v. OSU*, Case No. MA-3-88 (1989), *aff'd*, 100 Or App 261, *rev den*, 309 Or 698 (1990). The Board dismissed the appeal.

3.20a "Reprimand"

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written

reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. The Department argued that only the reprimand itself was reviewable under ORS 240.570(3), and that the removal from TERT was merely a removal of a discrete duty that was either not appealable or, alternatively, was subject to review under the lower standard in ORS 240.570(2), which applies to reassignments. The Board analyzed the reprimand and removal from TERT as one disciplinary action reviewable under ORS 240.570(3). The disciplinary document contained the reprimand and notified Appellant of his removal from TERT, based on the same facts and reasons. The Board dismissed the appeal.

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services Program supervisor appealed a written reprimand. The Department proved one charge, but not the other. A reprimand was appropriate. An “employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice,” citing *Hill v. Department of Transportation*, Case No. MA-7-02 at 13 (November 2002).

3.22 “Unfitness to render effective service” – ORS 240.555

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant’s lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney’s office’s Brady Review Committee, Appellant was in fact placed on the Brady list. Restoring Appellant, who was properly removed from the management service, to her former Social Services Specialist position in the classified service would not change her Brady listing. Her Social Services Specialist position would require significant participation in court. The Brady listing rendered Appellant “unfit to render effective service” under ORS 240.555. The Board dismissed the appeal.

3.24 Other definitions

Hogstad v. Marion County, Case No. MA-18-10 (January 2011): Marion County Facilities Manager appealed his dismissal, and then failed to respond to a letter from the administrative law judge (ALJ) asking the employee to withdraw his appeal or show cause why it should not be dismissed. The Board dismissed the appeal because (1) the Board lacked jurisdiction over appeals from individuals who were not employees of the State of Oregon pursuant to

ORS 240.015(19) (defining state service) and ORS 240.560 (setting out process for appeals from those in state service), and (2) Appellant's failure to respond to the ALJ's letter constituted a failure to prosecute.

Chapter 4 – Issuance of Personnel Action and Statement of Charges

4.1 Notice of expectations and deficiencies (see also 2.1 and 16.7)

Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015): Appellant was terminated on January 23, 2014 and did not file an appeal with the Board until August 1, 2014, 190 days later. ORS 240.560(1) provides that an appeal is timely if filed no later than 30 days after the effective date of the personnel action. Appellant argued that her late filing should be excused because the employer did not inform her of her appeal rights to the Board. Appellant relied on ORS 183.415(1), a portion of the Administrative Procedures Act (APA) related to contested case hearings, which states that “persons affected by actions taken by state agencies have a right to be informed of their rights and remedies” with respect to agency actions. Appellant argued that this statute required the employer to inform her of her appeal rights to the Board. The Board rejected this argument. ORS 183.415 applies to *contested cases*, not to employment disciplinary actions by a state agency involving one of its own employees. The Board also rejected Appellant's argument that her termination letter was an “order” within the meaning of the APA. Relying on *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977), the Board wrote that there is no statutory duty to inform a discharged employee of the proper appeal procedure, although the “better practice” is to include a notice of appeal in a termination letter. The Board dismissed the appeal as untimely.

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014): Training and Development Specialist 2 with the Oregon State Police (OSP) appealed her removal from the management service. Appellant began her state employment at Oregon Youth Authority in a classified position. She then worked in the Secretary of State's office, in a position designated as classified, unrepresented. Subsequently, Appellant was promoted into a management service position at OSP. OSP developed concerns about Appellant's work performance and conducted an investigation. In a pre-disciplinary letter, OSP informed Appellant that it was considering removing her from the management service under ORS 240.570(3). As OSP understood Appellant's restoration rights, she would not be returned to the classified service, but OSP's letter did not inform her that removal from management service would terminate her state service. During the pre-removal meeting, Appellant submitted a written response to the allegations. Appellant referred to the proposed action as a “proposed demotion.” Her attorney also referred to the proposed action as a “potential demotion.” OSP did not notify Appellant that it believed that her removal from the management service would terminate her state employment. Appellant was not afforded procedural due process as required by the Fourteenth Amendment to the United States Constitution, and therefore her removal from the management service and resulting termination from state service was invalid. Appellant had a constitutionally significant property interest in her continued state employment. In addition to a full post-removal/dismissal hearing, Appellant was

entitled to pre-removal/dismissal safeguards including: (1) notification of the charges against her, (2) notification of the kinds of sanctions being considered, and (3) at least an informal opportunity to refute the charges either orally or in writing before someone authorized to make or recommend a final decision. Although the first and third safeguards were satisfied, OSP did not notify Appellant that the possible sanctions included the end of her state service. Instead, OSP first informed Appellant of that ultimately imposed sanction after it had already decided to remove her from the management service. The Board was not persuaded by OSP's argument that a due process violation may be excused if the employee does not subsequently come forward with compelling evidence or argument that the employee would have offered if the employee had known about the true but undisclosed sanction. Where a termination is invalid due to a failure to comply with the due process clause of the Fourteenth Amendment, the proper remedy is reinstatement and an award of back pay and other benefits.

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department's Fiscal Manager, appealed a one-week unpaid suspension for poor performance. Hired in 2003, Appellant received two letters of reprimand (in 2008 and in 2010), received "needs improvement" ratings on two performance evaluations, and received written expectations and a work plan for inaccurate work and inattention to detail. The Department failed to prove the charge that Appellant acted wrongfully in submitting an incorrect timesheet and failing to promptly correct it. The Department did not give clear notice of enforcing a zero tolerance policy regarding timesheet errors. The Board stated that "it appears that the Department has enacted a zero tolerance policy regarding errors on timesheets. If that is the case, a reasonable employer announces the change prior to imposing discipline, which it did not do." The Board dismissed the appeal on other grounds.

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): A management service employee appealed his reprimand for writing an email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. The employee printed the email. The printed copy became intermixed with other documents and was discovered by a targeted colleague who brought the email to management's attention. The Department then disciplined the employee by issuing a letter of reprimand. The Department did not include any notice of appeal rights in the disciplinary letter and it incorrectly cited to just cause standards, rather than the statutory standards applicable to management service employees. Appellant raised these deficiencies as due process issues and also argued that he was not given adequate specificity of the charges and a reasonable opportunity to present mitigating facts and circumstances. The Board determined that the failure to provide the appeal rights was harmless error because the Appellant had timely appealed. The Board wrote that the appointing authority has no statutory duty to inform employees of appeal rights, citing *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977). Finally, the Board determined that Appellant had sufficient notice, given that a reprimanded employee is not deprived of a property interest. Therefore, due process is satisfied by a written notice of the discipline that includes the supporting facts and statutory grounds, which was met in this case.

4.2 Clarity and specificity of charges

Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015): Appellant was terminated on January 23, 2014 and did not file an appeal with the Board until August 1, 2014, 190 days later. ORS 240.560(1) provides that an appeal is timely if filed no later than 30 days after the effective date of the personnel action. Appellant argued that her late filing should be excused because the employer did not inform her of her appeal rights to the Board. Appellant relied on ORS 183.415(1), a portion of the Administrative Procedures Act (APA) related to contested case hearings, which states that “persons affected by actions taken by state agencies have a right to be informed of their rights and remedies” with respect to agency actions. Appellant argued that this statute required the employer to inform her of her appeal rights to the Board. The Board rejected this argument. ORS 183.415 applies to *contested cases*, not to employment disciplinary actions by a state agency involving one of its own employees. The Board also rejected Appellant’s argument that her termination letter was an “order” within the meaning of the APA. Relying on *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977), the Board wrote that there is no statutory duty to inform a discharged employee of the proper appeal procedure, although the “better practice” is to include a notice of appeal in a termination letter. The Board dismissed the appeal as untimely.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department’s letter did not specifically remove Appellant from the management service, but rather dismissed Appellant from state service. Dismissal from state service necessarily involves removal from the management service, and the grounds for removal are not required to be separately stated, citing *Mabe v. Department of Corrections*, Case No. MA-09-09 at 22 (July 2010).

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014): Training and Development Specialist 2 with the Oregon State Police (OSP) appealed her removal from the management service. Appellant began her state employment at Oregon Youth Authority in a classified position. She then worked in the Secretary of State’s office, in a position designated as classified, unrepresented. Subsequently, Appellant was promoted into a management service position at OSP. OSP developed concerns about Appellant’s work performance and conducted an investigation. In a pre-disciplinary letter, OSP informed Appellant that it was considering removing her from the management service under ORS 240.570(3). As OSP understood Appellant’s restoration rights, she would not be returned to the classified service, but OSP’s letter did not inform her that removal from management service would terminate her state service. During the pre-removal meeting, Appellant submitted a written response to the allegations. Appellant referred to the proposed action as a “proposed demotion.” Her attorney also referred to the proposed action as a “potential demotion.” OSP did not notify Appellant that it believed that her removal from the management service would terminate her state employment. Appellant was not afforded procedural due process as required by the Fourteenth Amendment to the United States Constitution, and therefore her removal from the management service and resulting termination

from state service was invalid. Appellant had a constitutionally significant property interest in her continued state employment. In addition to a full post-removal/dismissal hearing, Appellant was entitled to pre-removal/dismissal safeguards including: (1) notification of the charges against her, (2) notification of the kinds of sanctions being considered, and (3) at least an informal opportunity to refute the charges either orally or in writing before someone authorized to make or recommend a final decision. Although the first and third safeguards were satisfied, OSP did not notify Appellant that the possible sanctions included the end of her state service. Instead, OSP first informed Appellant of that ultimately imposed sanction after it had already decided to remove her from the management service. The Board was not persuaded by OSP's argument that a due process violation may be excused if the employee does not subsequently come forward with compelling evidence or argument that the employee would have offered if the employee had known about the true but undisclosed sanction. Where a termination is invalid due to a failure to comply with the due process clause of the Fourteenth Amendment, the proper remedy is reinstatement and an award of back pay and other benefits.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): A dismissal letter dismissing a management service employee with prior classified service from state service pursuant to ORS 240.570(5) and 240.555 is not required to separately state the grounds for removal from the management service pursuant to ORS 240.570(3), citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 27-28 (July 2006), *recons denied* (September 2006). The effect of a dismissal from state service of a management service employee naturally includes removal from the management service position. The Board dismissed the appeal relating to management service removal and granted the appeal related to dismissal from state service.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): On December 9, 2009, Appellant, a manager with prior classified service, was dismissed from state service under ORS 240.570(5) and 240.555. The letter stated that she was being dismissed for being “[u]nable or unwilling to fully and faithfully perform the duties of the position satisfactorily” and for “misconduct.” Although the letter did not refer to her removal from management service, her dismissal from state service necessarily involved removal from management service and, consequently, the Board did not require that the grounds for removal be separately stated, citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 27-28 (July 2006), *recons denied* (September 2006).

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from management service and dismissed from state service for inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily. The Department's letter did not specifically remove Appellant from the management service. Dismissal “from state service necessarily involves removal from management service, and we do not require that the grounds for removal be separately stated,” citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 27-28 (2006), *recons denied* (2006).

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): A management service employee appealed his reprimand for writing an email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. The employee printed the email. The printed copy became intermixed with other documents and was discovered by a targeted colleague who brought the email to management’s attention. The Department then disciplined the employee by issuing a letter of reprimand. The Department did not include any notice of appeal rights in the disciplinary letter and it incorrectly cited to just cause standards, rather than the statutory standards applicable to management service employees. Appellant raised these deficiencies as due process issues and also argued that he was not given adequate specificity of the charges and a reasonable opportunity to present mitigating facts and circumstances. The Board determined that the failure to provide the appeal rights was harmless error because the Appellant had timely appealed. The Board also wrote that the appointing authority has no statutory duty to inform employees of appeal rights, citing *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977). Finally, the Board determined that Appellant had sufficient notice, given that a reprimanded employee is not deprived of a property interest. Therefore, due process is satisfied by a written notice of the discipline that includes the supporting facts and statutory grounds, which was met in this case.

4.5 Rescission and reimposition of personnel action

Looney v. Oregon Military Department, Case No. MA-07-13 (September 2013): Appellant received a notice, dated July 11, 2013, of “intent to suspend” for one week. On August 6, 2013, the Department issued a memorandum rescinding the suspension “pending additional agency review.” The administrative law judge informed Appellant that there was no disciplinary action on which a hearing could be held, and directed Appellant to either withdraw the appeal or show cause why the appeal should not be dismissed. Appellant did not respond. The Board dismissed the appeal because there was no personnel action to appeal.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was suspended for one week without pay and demoted within the management service. The initial disciplinary letter did not provide Appellant with the opportunity for a pre-disciplinary meeting. The Department rescinded the disciplinary letter and reissued a new one that was identical except that it offered the opportunity for a pre-disciplinary meeting. The Board held that the Department cured the procedural defect and its initial failure to provide a pre-disciplinary meeting did not support Appellant’s contention that the discipline was pretextual.

Chapter 5 – Appeal Procedure

5.2.2 Timeliness (see also 17.2 and 18.1)

Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015): Appellant was terminated on January 23, 2014 and did not file an appeal with the Board until

August 1, 2014, 190 days later. ORS 240.560(1) provides that an appeal is timely if filed no later than 30 days after the effective date of the personnel action. Appellant argued that her late filing should be excused because the employer did not inform her of her appeal rights to the Board. Appellant relied on ORS 183.415(1), a portion of the Administrative Procedures Act (APA) related to contested case hearings, which states that “persons affected by actions taken by state agencies have a right to be informed of their rights and remedies” with respect to agency actions. Appellant argued that this statute required the employer to inform her of her appeal rights to the Board. The Board rejected this argument. ORS 183.415 applies to *contested cases*, not to employment disciplinary actions by a state agency involving one of its own employees. The Board also rejected Appellant’s argument that her termination letter was an “order” within the meaning of the APA. Relying on *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977), the Board wrote that there is no statutory duty to inform a discharged employee of the proper appeal procedure, although the “better practice” is to include a notice of appeal in a termination letter. The Board dismissed the appeal as untimely.

Matheson v. Secretary of State, Case No. MA-009-14 (June 2014): Appellant alleged that she was improperly dismissed from her position as an executive assistant with the Oregon Secretary of State, a position in the unclassified service, and subsequently provided a 90-day limited duration position with the Oregon Department of Transportation. Appellant asked that her permanent status with the state be restored. The Board dismissed the appeal because (1) the Board lacks jurisdiction over termination appeals from an unclassified executive service position, and (2) the appeal was filed more than 30 days after Appellant’s release from the Secretary of State.

Marshall v. Oregon Health Authority, Case No. MA-31-12 (December 2012): Employee appealed his removal from the management service due to a reorganization, effective July 31, 2012. On August 22, 2012, Appellant sent an email to the Board in which he wrote that he believed that the elimination of his position was handled poorly and possibly unlawfully, and that he had been retaliated against. Appellant wrote that he was “a little confused about how to proceed with a possible complaint.” A Board employee responded by email the same day and directed Appellant to information on the Board’s web site about how to file an appeal. On October 24, 2012, Appellant submitted an appeal, 85 days after the effective date of the layoff. In response to an inquiry from the administrative law judge to show cause why the appeal should not be dismissed, Appellant contended that his August 22 email should be considered timely. The Board declined to consider the August 22 email as an appeal. Appellant was aware that the Board employee interpreted his August 22 email as a request for information and, despite the fact that there were still eight days remaining at that point for the employee to file a timely appeal, he did not do so. The Board dismissed the October 24 appeal as untimely.

Furqan v. Department of Human Services, Case No. MA-16-12 (July 2012), recons (August 2012): Pursuant to ORS 240.570(3), Appellant sought to appeal a written reprimand with an effective date of May 29, 2012. On June 29, 2012, Appellant submitted an appeal to the Board’s offices via fax, 31 days after the effective date of the reprimand. Appeals must be filed within the 30-day limitation period established by ORS 240.560(1). The Board dismissed the appeal as

untimely. On reconsideration, the Board rejected Appellant's argument that she mistakenly believed her appeal was timely. The Board strictly adheres to the timeline for filing appeals because a party's failure to meet the statutorily required deadline deprives the Board of jurisdiction.

Wargnier v. Department of Consumer and Business Services, Case No. MA-09-10 (September 2010): Appellant received a reprimand effective July 6, 2010. She appealed on August 6, 2010. Appellant argued that she received the information that she believed was necessary to prepare her appeal only two days before she filed it. However, the Board dismissed the appeal as untimely, because it was not filed within 30 days of the discipline.

5.2.3 Pleading requirements

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services program supervisor appealed a written reprimand. The reprimand relied on two charges: Appellant's failure to consult the case files, database, and case worker before reinstating a father's visits with a child in the Department's custody, and Appellant's failure to return a phone call to a Court Appointed Special Advocate. The Board rejected the Department's attempt at hearing to expand the charges beyond those set forth in the letter of reprimand.

5.2.5 Dismissal for lack of prosecution/failure to pursue appeal

Jackson v. Business Development Department, Case No. MA-002-16 (May 2016): Principal Executive Manager F appealed his performance rating on his performance evaluation. The administrative law judge notified Appellant that he must show cause why the appeal should not be dismissed for untimeliness and lack of jurisdiction. The Department responded, but Appellant did not. Appellant's lack of response is a failure of prosecution, citing *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). The Board dismissed the appeal.

Templeton v. Department of Human Services, Case No. MA-020-15 (April 2016): Appellant appealed a reprimand. After the case was set for hearing, the Department informed the administrative law judge (ALJ) that Appellant had resigned and agreed to withdraw his appeal. The ALJ did not receive a withdrawal letter from Appellant. The ALJ issued an order to show cause, informing Appellant that the ALJ would recommend dismissal of the case if he did not respond. Appellant did not respond. Because Appellant failed to pursue his appeal, it was dismissed, citing *Holcomb v. Oregon Health Authority*, Case No. MA-13-11 (April 2012).

Holcomb v. Oregon Health Authority, Case No. MA-13-11 (April 2012): Appellant was notified on August 5, 2011, that he would be laid off effective September 30, 2011, because his position was being eliminated. He filed an appeal on September 2, 2011. The administrative law judge informed him that the appeal was premature because the layoff had not yet taken place, but that Appellant could renew his appeal once the layoff became effective. In March 2012, the

administrative law judge wrote to Appellant inquiring about the status of the matter. Appellant did not respond. The Board dismissed the appeal for failure to prosecute.

Hogstad v. Marion County, Case No. MA-18-10 (January 2011): A Marion County Facilities Manager appealed his dismissal, and then failed to respond to a letter from the administrative law judge (ALJ) asking the employee to withdraw his appeal or show cause why it should not be dismissed. The Board dismissed the appeal because (1) the Board lacked jurisdiction over appeals from individuals who were not employees of the State of Oregon pursuant to ORS 240.015(19) (defining state service) and ORS 240.560 (setting out process for appeals from those in state service), and (2) Appellant's failure to respond to the ALJ's letter constituted a failure to prosecute.

Solis Torres v. Department of Human Services, Office of Human Resources, Case No. MA-020-09 (June 2010): Principal Executive Manager B timely appealed her dismissal from the state management service. Two days before the hearing, Appellant requested a postponement to obtain legal counsel. The administrative law judge (ALJ) granted the request. After that, Appellant had no further contact with the ALJ despite several attempts by the ALJ and staff to contact her. The Board dismissed the appeal for lack of prosecution.

Tucker v. Department of Human Services, Case No. MA-04-10 (May 2010): Classified service employee, who was a member of a bargaining unit represented by a labor organization and subject to the terms of a collective bargaining agreement, appealed his dismissal. The administrative law judge (ALJ) warned Appellant that the appeal would be dismissed for lack of jurisdiction unless Appellant convinced the ALJ to the contrary. When Appellant did not respond, the Board dismissed the appeal for lack of jurisdiction and lack of prosecution.

Christensen v. Department of Administrative Services, Case No. MA-6-09 (April 2009): Temporary employee appealed her termination but failed to respond to the ALJ's dismissal warning letter. The Board dismissed the appeal for lack of prosecution.

Chapter 6 – Affirmative Defenses

6.2 Bad faith employer actions

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. Between May and October 2013, EL specifically told Appellant that he (EL) wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. Appellant argued that the agency director was directed by the

agency board to terminate Appellant even before the pre-dismissal process began. The Board rejected this argument. The agency director credibly testified that she had the authority to modify the board's directions. Moreover, Appellant never offered the agency director any satisfactory explanation or mitigating circumstances for his own conduct. The employer properly removed Appellant from the management service and dismissed him from the classified service. The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. In late 2011, he was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, Appellant was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death. Appellant argued that the Department's investigation was not sufficiently accurate or complete to justify the allegations against him. The investigation reports did contain "minor inaccuracies," but they did not undermine the fundamental facts supporting the discipline, and Appellant himself was interviewed multiple times and he submitted a written response, which did not meaningfully dispute the allegations. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager's directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV's supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow "proper conduct" as a unit manager. Appellant's removal resulted from her conduct at a meeting to develop interview questions for an open management position. A human resources manager who participated in the meeting was assigned to investigate Appellant's conduct. Appellant argued that DMV's investigation was "alarming, biased, in contravention of procedural and substantive requirements" and demonstrated an effort to remove Appellant. The Board disagreed. It was inappropriate for the participating HR manager to initially be involved in the investigation, but that problem was rectified when DMV, once it realized that discipline might be imposed, reassigned the investigation to another HR manager. If there were problems with the two subordinate employees' interviews conducted by the first HR manager, those problems were addressed when the employees submitted revised statements. The Board dismissed the appeal.

6.5 Discipline inconsistent with employer's prior practice

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. The Department proved that Appellant used abusive, racist, and sexist

language, managed his subordinates through abusive behavior, and stored more than 5,000 personal images on his work computer, including more than 100 images of nude women or couples engaged in sexual activity. Appellant established that no Department employees had been dismissed for having pornography on their work computers. Removal and dismissal of Appellant were nonetheless reasonable. Although the Department may not have previously dismissed an employee for possessing pornography on a work computer, “the volume of material contained in [Appellant’s] files was well above the average amount found in prior situations.” Further, the Department “proved that each case is examined independently based on the nature of the material, the volume of the images found, consideration of aggravating and mitigating factors, and the position held by the employee.” Also, Appellant’s conduct was not limited to possessing pornography at work, but also included the use of inappropriate and offensive language and abusive management behavior. The Board dismissed the appeal.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor’s degree. Appellant relied on a “degree” he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a “life experience degree.” In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed “145 semester” units, and answering “yes” next to the question, “Did you graduate?” His application also contained other misleading statements about the length of his service in prior managerial positions. Appellant alleged that another senior manager had breached confidentiality to a complaining citizen, and another senior manager allowed another Department human resources worker inappropriate leeway with reporting her time. Appellant presented, however, no evidence that OMD had a practice or policy of ignoring or condoning behavior analogous to his own. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager’s directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV’s supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow “proper conduct” as a unit manager. Appellant’s removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant argued that DMV’s investigation was “alarming, biased, in contravention of procedural and substantive requirements” and demonstrated an effort to remove Appellant. The Board disagreed. It was inappropriate for the participating HR manager to initially be involved in the investigation, but that problem was rectified when DMV, once it realized that discipline might be imposed, reassigned the investigation to another HR manager. If there were problems with the two subordinate employees’

interviews conducted by the first HR manager, those problems were addressed when the employees submitted revised statements. The Board dismissed the appeal.

6.6 Discrimination: sex, race, religion, handicap, age

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested and charged with driving under the influence (DUII). Appellant did not disclose the arrest for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Among other defenses, Appellant argued that her dismissal violated ORS 659A.112 *et seq.* (disability discrimination), 659A.183 (retaliation under the Oregon Family Leave Act), and 659A.865 (retaliation for filing a BOLI complaint). The Board does not have jurisdiction under these statutes and did not consider these defenses. [Note: Appellant did not argue that ODOT violated ORS 240.560(3).] Appellant also argued that ODOT failed to accommodate her alcoholism. The Board declined to consider the merits of this argument under the Americans with Disabilities Act. The Board dismissed the appeal.

6.7 Employer awareness of workplace problem (see also 4.3)

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee who reported to a different manager. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he (EL) wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service and dismissed him from the classified service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant argued that the harasser's manager should have been terminated because that manager took no action. There was no evidence, however, that the harasser's manager "had anything approaching the level of information possessed" by Appellant. The Board dismissed the appeal.

6.8 Employer failure to provide training

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. Appellant had not been trained specifically on whether the Department considered a consensual romantic relationship between a supervisor and direct subordinate to be inappropriate, or on whether a supervisor was required to report such a relationship. This lack of specific training did not preclude discipline. As a manager, Appellant should have recognized that the Department's Conflict of Interest policy requires reporting a romantic relationship with a direct subordinate because it creates a potential conflict of interest, even though the policy does not require reporting of romantic relationships at work. Appellant also should have known that, if he had questions, he should have consulted with his supervisor or human resources. The Board dismissed the management service appeal, but ordered the Department to reinstate Appellant to the classified service.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from the management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. The Board rejected Appellant's defense that he was inadequately trained. Appellant "was sufficiently trained in his duties to either know, or know how to find out, what steps to take. His failure to exercise these options was a dereliction of duty." The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. Appellant argued that he should receive counseling or a lower level of progressive discipline because the employer did not provide him with specific training in the role of contract administrator and the contracts process. The Board acknowledged that the employer did not provide him with this specific training, but Appellant's inappropriate conduct did not result from a lack of training or inexperience with the public contract process. Instead, it resulted from Appellant's failure to read one contract and his intentional disregard of the required involvement of the contracts unit in the preparation of the amendment for the other. The Board dismissed the appeal.

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant's job duties involved determining applicants' eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (*see Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010)*). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Appellant had no job-related purpose for obtaining and sharing the confidential information. In addition, Appellant used his work email to send offensive emails to estranged in-laws. Appellant argued that there was an interagency agreement allowing disclosure of the confidential information and that his employer had failed to properly train him on confidentiality. The Board determined that despite receiving and acknowledging repeated training on confidentiality, Appellant intentionally obtained confidential information for an employee in another department who had no proper business purpose for obtaining the information, made extensive personal use of his work email, and knew that it was wrong to do so. The Board also determined that dismissal was proportionate to the offense because Appellant breached clear instructions and practice. The Board concluded that Appellant had shown that he did not appreciate the wrongfulness of his actions and therefore, progressive discipline would not help correct his behavior.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest

in the disciplinary process. The Board concluded that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board rejected Appellant's attempt to "blam[e] his conduct on an utterly irrelevant training issue." The Board dismissed the appeal.

6.10 Off-duty conduct not subject to discipline

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from the management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In April 2011, Appellant was arrested and charged again with DUII; Appellant was off duty at the time. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. The Board held that an employer may require employees to refrain from off-duty conduct that would damage the employer's business, reputation, or the employee's effectiveness, and the Board will weigh the employee's competing interest to be free of employer intrusion into off-duty activities against these employer interests. Here, ODOT's mission involves providing a safe, efficient transportation system. Appellant's conduct "strikes at the core of the agency's mission, values, and goals," and was also the subject of a media report that reflected negatively on ODOT's reputation. In addition, Appellant's conduct and its public exposure would likely have damaged her effectiveness as a manager. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, Appellant's failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. The Board dismissed the appeal.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from the management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee

at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at the classified employee's house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. Appellant threatened to report the classified employee's friend, a police officer, to his supervisor, and did so. In a subsequent text message, Appellant told the classified employee that he was "immature and really not a man" and that he was "dead" to her. In subsequent communications between them, the classified employee again stated that he might go to human resources. Appellant wrote to the employee that she would "defend herself to the end" and told him to stop and move on with his life. The classified employee told Appellant that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel for a position for which the ex-girlfriend was an applicant. Appellant did not report her connection to the ex-girlfriend or remove herself from the hiring panel. The Department removed Appellant from management service for, in part, making threats against the classified employee, including threats about his stated intention to consult human resources. The Board concluded that removal was appropriate, reasoning that the Appellant's "assertion that she was merely defending herself, which she believed was her right under the circumstances, completely discounts the fact that she was a high level manager making these statements to a classified employee in relation to a work-related matter, *i.e.*, his right to file a complaint for policy violations." The Board wrote, "Appellant was a Department manager and by deciding to become sexually involved with a classified employee, she knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an obligation to notify her supervisor as soon as she became aware that such an impact existed." The Board dismissed the appeal.

6.13 Whistleblower statute

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant argued, among other things, that his removal violated ORS 659A.203, the public employee whistleblower statute. The Board declined to consider Appellant's argument because the Board does not have jurisdiction to hear appeals of violation of ORS 659A.203. The Board held that the removal from management service did not violate ORS 240.570(3). The Board dismissed the appeal.

Chapter 8 – Hearing

8.1 Date of hearing

Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016): Principal Executive Manager D, a section manager for the Oregon Medical Marijuana Program, appealed her removal from the management service as a result of a reorganization and layoff at the Oregon Health Authority (OHA). Appellant incorrectly stated her email address in her appeal. Appellant did not respond to the administrative law judge's (ALJ) request to provide hearing dates. The ALJ

set the hearing for October 15. Eventually, after being contacted by the Board's Hearings Assistant by telephone, Appellant informed the Hearings Assistant that she could not attend a hearing on October 15. The Hearings Assistant advised Appellant to contact OHA's counsel. Appellant did so. OHA objected to postponing the October 15 hearing. The hearing occurred on October 15. At the hearing, Appellant stated that she had consulted an attorney who would represent her if the hearing were postponed. The ALJ postponed the hearing. Appellant's counsel subsequently informed OHA's counsel and the ALJ that Appellant had consulted him, that Appellant wished to represent herself at the hearing, and that she was available for hearing on December 7. The ALJ held the remainder of the hearing on December 7. The Board held that the ALJ properly continued the October 15 hearing consistent with the Board rule on postponements and the requirements of due process, citing *Van Dyke v. Department of Fish and Wildlife*, Case No. MA-6-01 (November 2002).

8.4 Burden of proof

Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016); see also Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016): In the appeal of a nondisciplinary removal from management service due to reorganization, the appellant has the burden of proof, citing OAR 115-045-0030(6); *Hauck v. Department of Housing and Community Services*, Case No. MA-1-03 (December 2003); *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998).

Bathke v. Oregon Health Authority, Case No. MA-012-15 (March 2016): Principal Executive Manager E appealed her removal from the management service because of a reorganization and layoff. In cases arising under ORS 240.570(2), the appellant has the burden of proof, citing OAR 115-045-0030(6).

8.6 Motions (see also Chapter 16)

Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016): Pursuant to ORS 240.570(2), Principal Executive Manager E appealed her removal from the management service as a result of a reorganization and layoff at the Oregon Health Authority (OHA). Appellant challenged a number of aspects of the layoff, including, among others, that she was called into the layoff announcement meeting without prior notice and that OHA categorized her separation in multiple ways. OHA filed a motion to dismiss on the grounds that the appeal failed to state a claim for relief under ORS 240.570. The administrative law judge correctly ruled that the prehearing allegations raised issues of fact or law regarding whether the employment actions at issue were in good faith and part of a legitimate reorganization, requiring a hearing.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. At the close of the first day of hearing, the Department announced that it rested its case. At the beginning of the next day of hearing, the Department asked to reopen its case to recall a witness to correct the record because the witness

realized that he had erred regarding the dates of certain events. The Board concluded that the ALJ acted within his discretion in allowing the testimony. Appellant had not begun his portion of the hearing and was not unfairly prejudiced by allowing the Department to reopen its case. Appellant was not unfairly prejudiced by the corrected testimony; he had ample opportunity to cross-examine the witness and to present argument that the changed testimony affected the credibility of the witness.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): The Department filed a motion for reconsideration of the Board's original May 2010 order reinstating Appellant to her prior position after a two-month demotion. The Department alleged that it could not comply with the Board's order reinstating Appellant to her prior position because, when Appellant returned to work, she was often absent, created a number of problems, and ultimately resigned. As a result, she worked only 12 hours during the month before resigning. The Board declined to consider the Department's motion because it was based on factual evidence that was not part of the original record. In doing so, the Board noted that the Department had not sought to reopen the record to introduce any new evidence to support the Department's assertion. The Board also declined to reconsider issues raised in the original case.

Chapter 9 – Board and Appellate Court Review

9.1 Board review and order; reopening the record

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): The Department filed a motion for reconsideration of the Board's original May 2010 order reinstating Appellant to her prior position after a two-month demotion. The Department alleged that it could not comply with the Board's order reinstating Appellant to her prior position because, when Appellant returned to work, she was often absent, created a number of problems, and ultimately resigned. As a result, she worked only 12 hours during the month before resigning. The Board declined to consider the Department's motion because it was based on factual evidence that was not part of the original record. In doing so, the Board noted that the Department had not sought to reopen the record to introduce any new evidence to support the Department's assertion. The Board also declined to reconsider issues raised in the original case.

Chapter 11 – Classified Employees' Appeals of Actions Effective on and after July 1, 1981: Employee Not Included in Bargaining Unit

11.1 ORS 240.555 and standard of review (see also 3.19)

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), aff'd without opinion, 268 Or App 717, 344 P3d 567, rev den, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from the management service and dismissal from the classified service. The Department proved that Appellant used abusive, racist, and sexist language, managed his subordinates through abusive behavior, and stored more than 5,000

personal images on his work computer, including more than 100 images of nude women or couples engaged in sexual activity. The Board explained that the standard to justify removal from management service “is relatively minor, and management employees may be held to strict standards of behavior so long as the standards are not arbitrary or unreasonable.” A removal from management service may be based on a single proven charge. When the employee is also being dismissed from state service under ORS 240.555, the Board applies “a more stringent standard, and charges that are sufficient to support a removal from management service may not be sufficient to justify a dismissal from state service.” The employer must establish that its action was taken in good faith for cause. The Department met that standard in this case. The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from classified service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. To dismiss a management employee with prior classified service for the reasons stated in ORS 240.555, the employer must establish that it acted in good faith for cause and show that it used progressive discipline, except when the employee’s offense is sufficiently serious to warrant summary dismissal or the employee’s behavior would not be improved by progressive measures. Applying that standard, the Board held that a reasonable employer would not have dismissed Appellant in light of his lack of discipline during more than 10 years of state service and the fact that he did not show favoritism toward his partner or attempt to conceal the relationship.

11.2.1 Dismissal

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant’s lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney’s Brady Review Committee, Appellant was in fact placed on the Brady list. Restoring Appellant, who was properly removed from the management service, to her former Social Services Specialist position in the classified service would not change her Brady listing. The classified social services specialist position would require significant participation in court. The Brady listing therefore rendered Appellant “unfit to render effective service” under ORS 240.555. The Board dismissed the appeal.

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant's job duties involved determining applicants' eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (*see Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010)*). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Appellant had no job-related purpose for obtaining and sharing the confidential information. In addition, Appellant used his work email to send offensive emails to estranged in-laws. Appellant argued that there was an interagency agreement allowing disclosure of the confidential information and that his employer had failed to properly train him on confidentiality. Appellant also argued that the employer failed to use progressive discipline by terminating him. The Board determined that despite receiving and acknowledging repeated training on confidentiality, Appellant intentionally obtained confidential information for an employee in another department who had no proper business purpose for obtaining the information, made extensive personal use of his work email, and knew that it was wrong to do so. The Board also determined that dismissal was proportionate to the offense because Appellant breached clear instructions and practice. The Board also determined that Appellant made contradictory claims during the investigation, the unemployment benefits hearing, and the ERB hearing. As such, the Board determined that Appellant had shown that he did not appreciate the wrongfulness of his actions and therefore, progressive discipline would not help correct his behavior.

11.2.10 Classification/allocation of position

Stigers v. Oregon Health Authority, Case No. MA-010-15 (May 2016): Appellant was in the management service and accepted a classified position in a bargaining unit in lieu of layoff. Among other arguments, Appellant contended that the layoff was not performed according to policy or the collective bargaining agreement, that she was paid less than she should have been and that her classified position was inappropriately classified. ORS 240.560 and 240.570 do not permit appeal of those types of personnel actions. Therefore, the Board had no jurisdiction to consider Appellant's arguments regarding those actions. The Board dismissed the appeal.

Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016): Pursuant to ORS 240.570(2), Principal Executive Manager E appealed her removal from the management service as a result of a reorganization and layoff. Appellant was restored to a classified position, resulting in a reduction in salary. Among other arguments, Appellant sought to appeal the loss in salary resulting from her placement in a position in a lower salary range. Appellant's challenge to the loss of salary "is not a management service personnel action listed in ORS 240.570, and this Board does not have 'authority to set aside or modify a personnel action

that is in violation of a personnel rule,” citing *Knutzen v. Dept. of Ins. and Finance*, 129 Or App 565, 569, 879 P2d 1335 (1994). The Board dismissed the appeal.

11.3 Appropriateness of personnel action

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant’s job duties involved determining applicants’ eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (see *Schafer v. Department of Human Services*, Case No. MA-14-09 (June 2010)). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Appellant had no job-related purpose for obtaining and sharing the confidential information. In addition, Appellant used his work email to send offensive emails to estranged in-laws. Appellant argued that there was an interagency agreement allowing disclosure of the confidential information and that his employer had failed to properly train him on confidentiality. Appellant also argued that the employer failed to use progressive discipline by terminating him. The Board determined that despite receiving and acknowledging repeated training on confidentiality, Appellant intentionally obtained confidential information for an employee in another department who had no proper business purpose to obtain the information, made extensive personal use of his work email, and knew that it was wrong to do so. The Board also determined that dismissal was proportionate to the offense because Appellant breached clear instructions and practice. The Board also determined that Appellant made contradictory claims during the investigation, the unemployment benefits hearing, and ERB hearing. As such, the Board determined that Appellant had shown that he did not appreciate the wrongfulness of his actions and therefore, progressive discipline would not help correct his behavior.

Chapter 12 – Management Service Employment (effective July 1981)

12.1 ORS 240.570 and standard of review (see also 3.19)

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service because an independent entity, the District Attorney’s office, placed her on the Brady list, which effectively precluded her from being able to perform the court-related duties of her position, which took approximately 10 to 15 percent of her time. ORS 240.570(3) provides that the employer can lawfully remove an employee from management service for an inability to fully and faithfully perform the duties of the position satisfactorily. The Board concluded that the District Attorney’s Brady listing of Appellant rendered her unable to fully and faithfully perform the duties of her management service position satisfactorily.

Therefore, the employer acted as a reasonable employer in removing Appellant from management service after she was Brady listed. In addition, the Board concluded that the Brady listing would render Appellant “unfit to render effective service” under ORS 240.555. The Board, therefore, declined to address the employer’s argument that Appellant had no right to be restored to her prior classified position under recent statutory amendments (see Or Laws 2014, ch 22, § 1).

Bathke v. Oregon Health Authority, Case No. MA-012-15 (March 2016): Principal Executive Manager E appealed her removal from the management service because of a reorganization and layoff. As a result of the reorganization, Appellant was informed that she could be restored to her classified Operations and Policy Analyst 2 position, which she accepted. The Board concluded that Appellant’s removal from the management service and restoration to the classified service should be analyzed under ORS 240.570(2), which addresses non-disciplinary personnel actions, and not ORS 240.570(3), which addresses when management service employees may be disciplined. Appellant’s personnel actions “in reality consisted of two simultaneous layoffs and an ORS 240.570(5) restoration.” In reorganization cases, the appellant must prove that the reorganization was done in bad faith and was not due to a legitimate reorganization. A legitimate reorganization is a reorganization that is rational and *bona fide* from inception to implementation, made in good faith, made to advance the efficiency and effectiveness of the organization, and not a sham for another purpose, citing *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 at 11 (February 1998). The Board dismissed the appeal.

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services Program supervisor appealed a written reprimand. The employer has the burden of proving that its discipline did not violate ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all the circumstances, that the employer’s actions were objectively reasonable. A reasonable employer 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 serious enough to warrant summary dismissal. A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. A management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. In addition, the Department need not prove all of the charges on which it relied in disciplining an employee, so long as the proven charge warrants the discipline imposed. The Board may also consider any damage to the trust in the relationship between a management service employee and the employer. A reprimand is the mildest form of discipline recognized under ORS 240.570(3). The Board has stated that an employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice, citing *Hill v. Department of Transportation*, Case No. MA-7-02 at 13 (November 2002).

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant appealed a written reprimand and removal from the Tactical Emergency

Response Team (TERT), resulting in loss of a four percent pay differential. The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). In order to meet that burden, the employer must ultimately show that, under all the circumstances of the case, the discipline imposed was objectively reasonable. Broadly speaking, a reasonable employer is one that 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 sufficiently serious or unmitigated to warrant summary dismissal. A reasonable employer also defines performance expectations, clearly expresses those expectations to employees, and informs employees when those expectations are not being met. In addition, it administers discipline in a timely manner. The Board reviews management service disciplinary appeals using a two-step process. First, the Board determines if the employer proved the charges that are the basis for the discipline. If the employer proves some or all of the charges, the Board applies the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action that it did. The employer need not prove all of the charges on which it relies. The Board may sustain discipline of a management service employee upon proof of only a single charge, citing *Carter v. Department of Corrections*, Case No. MA-12-99 at 12 (September 2001). The Board determined that the reprimand and the removal from the TERT were part of a single disciplinary action, and should be considered together under the standards of ORS 240.570(3).

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. When an employee had status as a classified service employee immediately before he was promoted to the management service, the Board will consider two separate personnel actions: (1) removal from management service under ORS 240.570(3); and (2) dismissal from state service under ORS 240.570(5) and 240.555. The employer has the burden of proving that both actions were lawful. The employer meets its burden if the Board determines, under all the circumstances, that the employer's actions were objectively reasonable. A reasonable employer is one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures. The Board noted that earlier Board decisions used the word "gross" in describing this standard (as in "an employee's offense is gross"). The Board explained that the updated phrasing of the standard is intended only to eliminate the outdated use of the word "gross." The new phrasing "does not change our test—*i.e.*, some employee actions justify dismissal even where no prior discipline has been imposed." The Board applies a two-step analysis in reviewing appeals. First, the Board determines whether the employer has proven the charges that are the basis of the discipline, although not all charges must be proven. If the Board finds that the employer has proven

any of the charges, then it applies a reasonable employer standard to determine whether the employer was justified in imposing the disciplinary actions that it did.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. When an employee had status as a classified service employee immediately before she was promoted to the management service, the Board will consider two separate personnel actions: (1) removal from management service under ORS 240.570(3); and (2) dismissal from state service under ORS 240.570(5) and 240.555. The employer has the burden of proving both removal from management service and dismissal from state service. The employer meets that burden of proof if the Board determines that under all of the circumstances the employer's actions were objectively reasonable. A reasonable employer is one that "disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee's length of service and service record." A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures. The Board applies a two-step analysis in reviewing appeals. First, the Board determines whether the employer has proven the charges that are the basis of the discipline, although not all charges must be proven. If the Board finds that the employer has proven any of the charges, then it applies a reasonable employer standard to determine whether the employer was justified in imposing the disciplinary actions that it did.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." The employer has the burden of providing that its discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer's actions were objectively reasonable. In applying the objectively reasonable standard to management service cases, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. A significant factor for the Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. In addition, Board precedent gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. Although the employer's burden in justifying management service discipline is "relatively minor" when compared to discipline concerning employees in the classified service, management service discipline must nevertheless be objectively reasonable,

citing *Zaman v. Department of Human Services*, Case No. MA-21-12 at 15 (April 2013). Applying this burden, the Board reviews management service disciplinary appeals using a two-step process. First, the Board determines if the employer proved the charges that are the basis of the discipline. The employer need not prove all of the charges on which it relies. Second, if the employer proved some of the charges, the Board applies a reasonable employer standard to determine whether the employer was justified in taking the particular disciplinary action.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C appealed his removal from the management service. ORS 240.570(3) provides that a “management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer’s actions were objectively reasonable. In applying the objectively reasonable standard, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. A significant factor for the Board’s consideration is the extent to which the employer’s trust and confidence in the employee have been harmed, compromising the employee’s ability to act as a member of the management team. Board precedent also gives weight to the effect of the employee’s actions on the mission and image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. The employer’s burden in justifying a removal from the management service is relatively minor. The Board first determines whether the employer proved the charges that are the basis of the discipline. The employer need not prove all of the charges on which it relies. The Board then determines whether the employer acted as an objectively reasonable employer, which the Board has defined as one that clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. A reasonable employer also 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. A reasonable employer, however, may not be required to use progressive discipline where an employee’s offense is sufficiently serious to warrant summary dismissal, or the employee’s behavior probably will not be improved through progressive measures.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from classified service. ORS 240.570(3) provides that a “management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee “may be dismissed from state service only for reasons specified by ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560.” The reasons for discipline or dismissal under ORS 240.555 are “misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render

effective service.” The Board considers both actions. The employer has the burden of providing that both actions were lawful. The employer meets its burden with respect to the management service removal if the Board determines, under all of the circumstances, that the employer’s actions were objectively reasonable. An employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. A significant factor in the Board’s consideration is the extent to which the employer’s trust and confidence in the employee have been harmed, compromising the employee’s ability to act as a member of the management team. In addition, Board precedent gives weight to the effect of the management service employee’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. The employer’s burden in justifying removal from management service is “relatively minor,” quoting *Zaman v. Department of Human Services*, Case No. MA-21-12 at 15 (April 2013). In the appeal of a dismissal from state service, the Board scrutinizes the employer’s conduct more stringently, under rules that are substantially different from those governing management service removal. Charges that are adequate to support removal from management service might not be sufficient to justify dismissal from state service. An employer must show that it dismissed the employee in good faith for cause.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. Management service employees are subject to a range of discipline, including suspension, “if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” ORS 240.570(3). The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer’s actions were objectively reasonable. An employer may hold a management service employee to strict standards of behavior, so long as the standards are not arbitrary or unreasonable. A significant factor for the Board’s consideration is the extent to which the employer’s trust and confidence in the employee has been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the management team has been compromised. Board precedent also gives weight to the effect of the employee’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. Management service disciplinary action is reviewed under a two-step process. First, because a reasonable employer is one who disciplines employees in good faith and for cause, the employer must first prove the charges that are the basis of the discipline. The employer need not prove all of the charges on which it relies. Second, the employer must demonstrate that the level of discipline imposed was objectively reasonable. A reasonable employer imposes sanctions that are proportionate to the offense, considers the employee’s length of service and service record, and applies the principles of progressive discipline. However, a reasonable employer may not be required to use progressive discipline where an employee’s offense is sufficiently serious to warrant summary dismissal, or the employee’s behavior probably will not be improved through progressive measures.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from classified service. The Board separately analyzes a management service dismissal and a dismissal from state service. First, the Board begins by determining whether the employer proved the charges that the actions were based on. If so, the Board then applies the reasonable employer standard to determine if the employer's removal of the employee was lawful. The Board then determines whether the employer acted lawfully when it dismissed the employee from state service. The standard to justify removal from the management service is relatively minor, and management employees may be held to strict standards of behavior so long as the standards are not arbitrary or unreasonable. A removal from the management service may be based on a single proven charge. When the Board applies the reasonable employer test to review a dismissal from state service, the Board applies a more stringent standard, and charges that are sufficient to support a removal from the management service may not be sufficient to justify a dismissal from state service. For dismissal cases, the employer must establish that its action was taken in good faith for cause. When the Board applies the reasonable employer standard, it conducts an evaluation of all of the circumstances surrounding the removal or dismissal to determine whether the employer's action was objectively reasonable. 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 so serious as to warrant summary dismissal. Where no prior disciplinary actions have been taken against an employee, the Board also determines whether the circumstances of the dismissal justify the lack of progressive discipline. The employer has the burden of proving that each of its personnel actions was lawful.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. The employer has the burden of proving the discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all the circumstances, that the employer's actions were objectively reasonable. The Board reviews management service disciplinary appeals using a two-step process. First, the Board determines if the employer proved all charges that are the basis for the discipline, although the employer need not prove all of the charges on which it relies. Second, if the employer has proven any of the charges, the Board applies the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. A reasonable employer is one that clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. A reasonable employer also "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," quoting *Smith v. Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001). However, a reasonable employer may not be required to use progressive discipline "where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994). In applying the objectively reasonable standard in management service

discipline cases, an employer may hold a management service employee to strict standards of behavior, so long as the standards are not arbitrary or unreasonable. In addition, a significant factor in the Board's analysis is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. Board precedent also gives weight to the effect of the management service employee's actions on the mission and image of the agency and the extent to which those actions do not reflect the proper use of judgment and discretion.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. The employer has the burden of proof regarding both the dismissal from state service and the removal from management service. The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer's actions were objectively reasonable. The Board has defined a reasonable employer as one that "disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee's length of service and service record," quoting *Smith v. Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001). A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, "except where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994). The Board first determines whether the employer proved the charges that are the basis of the actions. If the charges are proven, the Board applies the reasonable employer test twice, first to the removal from management service and then to the dismissal from state service. The Board considers the separate personnel actions separately. In applying the reasonable employer standard in management service discipline cases, an employer may hold a management service employee to very strict standards of behavior, as long as the standards are not arbitrary or unreasonable. The employer's burden in justifying a removal from management service is relatively minor. In analyzing whether an employee was dismissed from state service consistent with ORS 240.570(5) and 240.555, the employer must establish that it acted in good faith for cause. The employer must also show that it used progressive discipline, except when the employee's offense is serious enough to warrant summary dismissal, or the employee's behavior would not be improved by progressive measures.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer's actions were objectively reasonable. The Board reviews management service disciplinary appeals using a two-step process. First, the Board determines if the employer proved the charges that are the basis of the discipline, although the employer need not prove all of the

charges on which it relies. Second, if the employer has proven some or all of the charges, the Board applies a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. A reasonable employer is one that clearly defines performance expectations, provides those expectations to employees, and tells the employees when those expectations are not being met. A reasonable employer also imposes sanctions that are proportionate to the offense, considers the length of service and service record, and applies the principles of progressive discipline. A reasonable employer, however, may not be required to use progressive discipline where an employee's offense is sufficiently serious to warrant summary dismissal, or the employee's behavior probably will not be improved through progressive measures. An employer may hold a management service employee to strict standards of behavior, as long as the standards are not arbitrary or unreasonable. A significant factor for the Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised. Board precedents give weight to the effect the employee's actions on the mission and image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service and return to the classified service. The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). The employer meets its burden of proof if the Board determines, under all of the circumstances, that the employer's actions were objectively reasonable. The Board reviews management service disciplinary appeals using a two-step process. First, the Board determines if the employer proved the charges that are the basis of the discipline, although the employer need not prove all of the charges on which it relies. Second, if the employer has proven some or all of the charges, the Board applies a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. A reasonable employer is one that clearly defines performance expectations, provides those expectations to employees, and tells the employees when those expectations are not being met. A reasonable employer also imposes sanctions that are proportionate to the offense, considers the length of service and service record, and applies the principles of progressive discipline. A reasonable employer, however, may not be required to use progressive discipline where an employee's offense is sufficiently serious to warrant summary dismissal, or the employee's behavior probably will not be improved through progressive measures. An employer may hold a management service employee to strict standards of behavior, as long as the standards are not arbitrary or unreasonable. A significant factor for the Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised. Board precedents give weight to the effect of the employee's actions on the mission and image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion.

Rux v. Oregon Health Authority, Case No. MA-08-12 (December 12, 2012), *nunc pro tunc order* (December 14, 2012): Operations Policy Analyst 3 appealed her layoff from the

management service. The Board reviews layoffs caused by reorganizations under a deferential standard. The Board is “not authorized to do equity or second-guess the efficacy of employer decisions,” citing *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998). Employers must be “free to exercise substantial discretion in determining how best to utilize their own management personnel in the pursuit of agency objectives,” quoting *Downs v. Children’s Services Division*, Case No. MA-12-90 at 16, *aff’d*, 115 Or App 758, 838 P2d 1119 (1992). To be legitimate, “a reorganization must be rational and bona fide from inception to implementation. It must be made in good faith, and it must advance the efficiency and effectiveness of the organization. A legitimate reorganization is not contrived or a sham for some other purpose. In a given organization, numerous different forms of reorganization may be legitimate,” quoting *Rosevear* at 11. Concluding that the employer followed its own rules regarding selection of positions for layoff and had in fact sustained a significant budget reduction, and that the reduction could not be implemented without eliminating two positions, including Appellant’s, the Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from the management service. The employer bears the burden of proving that its action was lawful. It meets that burden if the Board determines, under all of the circumstances, that the Department’s actions were objectively reasonable. 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,” quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). The employer must establish that its action was taken “in good faith for cause,” quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992). If the employer meets this burden, the Board then applies the reasonable employer standard to determine whether the circumstances of the dismissal justify the lack of progressive discipline. An employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. An important consideration is the extent to which the employer’s trust and confidence in the employee have been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the management team has been compromised. “In other dismissal cases, this Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the action(s), and the likelihood of repeated misconduct,” citing *Smith v. Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001).

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department’s Fiscal Manager, appealed a one-week unpaid suspension for poor performance. In reviewing management service discipline under ORS 240.570(3), the Board determines whether, under all the circumstances of the case, the employer’s action is objectively reasonable. 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. A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. In addition, a reasonable employer administers discipline in a timely manner," quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004)(internal citations omitted).

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). The Board applies a two-step analysis in reviewing management service appeals. The Board first determines whether the employer has proven the charges that are the basis of the discipline. The employer need not prove all of the charges on which it relies. If the employer has proven some or all of the charges, the Board then applies a reasonable employer standard to determine if the employer was justified in taking the disciplinary action it did. A reasonable employer is one who disciplines employees in good faith and for cause and also clearly defines performance expectations, and tells employees when those expectations are not being met. In addition, a reasonable employer imposes sanctions that are proportionate to the offense and considers the length of service and service record. A reasonable employer "generally uses progressive discipline, except where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994). A significant factor in the Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent of the employee's capacity to act as a member of the management team has been compromised. Board precedent also gives weight to the effect of the employee's action on the mission and image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. An employer may hold a management service employee to strict standards of behavior, so long as the standards are not arbitrary or unreasonable.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): A Principal Executive Manager C appealed her removal from the management service. The Board applied a "reasonable employer" standard, which involves an objective evaluation of all circumstances of the removal or dismissal to determine whether the employer's action was objectively reasonable, citing *Brown v. Oregon College of Education*, 52 Or App 251, 260-61, 628 P2d 410 (1981). 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," quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). Applying the reasonable employer standard, the Board scrutinizes a dismissal from state service more stringently and under rules that are substantially different from those governing removal from management service. Charges that are adequate to support removal from management service may not be sufficient to

justify dismissal from state service. A manager is held to high standards, although those standards must not be arbitrary or unreasonable. An important consideration in the Board's review of a removal from management service is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. A reasonable employer is one who disciplines employees in good faith and for cause. The employer must demonstrate that the level of discipline imposed was objectively reasonable. A reasonable employer imposes sanctions that are proportionate to the offense; considers the employee's length of service and service record; and applies the principles of progressive discipline. However, a reasonable employer may not be required to use progressive discipline "where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," citing *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (April 1993). Under this "objectively reasonable" standard, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable, citing *Helper v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a manager has been compromised. Board precedent also gives weight to the effect of the employee's actions on the mission and the image of the agency and the extent to which those actions reflect the proper use of judgment and discretion, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Miller v. Department of Human Services, Seniors and People With Disabilities, Case No. MA-10-10 (April 2011): Principal Executive Manager B appealed the Department's refusal to allow her to rescind her resignation. The Board held, pursuant to ORS 240.570(2), that it had no jurisdiction over the Department's refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. To establish a constructive discharge, the complainant must prove (1) that the employer deliberately created or deliberately maintained the working condition(s), (2) with the intention of forcing the employee to leave the employment, and (3) that the employee left the employment because of the working conditions. The working conditions that spark the constructive discharge must be so intolerable that a reasonable person in the employee's position would have resigned, citing *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), and *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995). See also *Holley v. Department of Environmental Quality*, Case Nos. MA-9/13-89 (April 1990). Appellant alleged that the Department misled her as to the amount of family leave to which she was entitled (pursuant to the Family and Medical Leave Act (FMLA)), transferred her into a position in which she supervised fewer employees, and required her to begin her work day at a time that interfered with her child care arrangements. These allegations were insufficient to demonstrate that the

Department deliberately created intolerable working conditions with the intention of forcing Appellant to leave or that Appellant left work because of these conditions.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Because Appellant had status as a classified service employee before he was promoted to the management service, the Board considers two separate personnel actions: (1) removal from the management service under ORS 240.570(3), and (2) dismissal from the classified service under ORS 240.570(5) and 240.555. The employer has the burden of proving both actions are lawful. The Board uses a two-step process. The Board first determines if the employer proved the charges on which the actions are based. If the employer has proven the charges, the Board then applies a reasonable employer standard twice—first to the removal from the management service, and second to the dismissal from state service. A reasonable employer is “one who disciplines 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,” quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (2004), *recons* (June 2004). The employer’s burden to justify a removal from the management service is relatively minor. A management service employee may be held to strict standards of behavior, so long as the standards are not arbitrary or unreasonable. In regard to an employee with law enforcement responsibilities, an employer can reasonably expect that the employee will avoid conduct that would place their personal integrity in question or bring discredit on their commission as a law enforcement officer. When the Board applies the reasonable employer test to review a dismissal from state service, it scrutinizes an agency’s conduct more stringently. Charges that are adequate to support removal from the management service might not be sufficient to justify dismissal from state service. An employer must show that it dismissed the employee in good faith for cause.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant Manager appealed a one-week disciplinary suspension. The employer has the burden of proving that its discipline did not violate ORS 240.570(3). The employer meets its burden if the Board determines, under all of the circumstances, that the employer’s actions were objectively reasonable. A reasonable employer is “one who disciplines employees in good faith and for cause,” quoting *Bellish v. Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). If the employer proves its charges, the Board next determines whether the level of discipline imposed is objectively reasonable in light of all of the circumstances. The Board allows an employer to hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. A significant factor for the Board’s consideration is the extent to which the employer’s trust and confidence in the employee has been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the management team has been compromised. Board precedent also gives weight to the effect of the management service employee’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment or discretion. A reasonable employer imposes sanctions that are proportionate to the

offense and considers the employee's length of service and service record. In addition, a "reasonable employer generally uses progressive discipline, except where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures," quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994).

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, appealed a one-week suspension and permanent demotion. The employer has the burden of proving that its discipline did not violate ORS 240.570(3). The Board follows a two-step process in its review of management service discipline. The Board begins by determining whether the employer has proven the charges alleged in the discipline. If the Board finds that the employer has proven the charges, it applies a reasonable employer standard to determine if the employer was justified in taking the disciplinary action it did. 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. A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. In addition, a reasonable employer administers discipline in a timely manner," quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). A significant factor in the Board's analysis of management service employee discipline is the extent to which the employer's trust and confidence in the employee has been harmed and therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised. The employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. The employer also need not prove all of the charges on which it bases its discipline.

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): A management service employee appealed a reprimand. The employer has the burden of proving that its discipline complied with ORS 240.570(3). In order to prevail, the employer must show that, under all the circumstances, the discipline it imposed on a management service employee is objectively reasonable. The Board explained, "If performance standards are not arbitrary or unreasonable, given the authority and responsibility of the employee in question, failure to satisfactorily meet these expectations can be cause for discipline or removal even if the standards are very strict. But because the standard in ORS 240.570(3) is not merely a subjective one, this Board still must decide whether under all the circumstances of the case the 'action [of the employer] is objectively reasonable,'" quoting *Morisette v. Children's Services Division*, Case No. 1410 at 23 (March 1983). If the employer gives more than one reason for its discipline, the Board may conclude that the discipline is "objectively reasonable," even though the employer has not proven all of the reasons. 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 serious enough to warrant summary dismissal. A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs

them when performance standards are not being met. In addition, a reasonable employer administers discipline in a timely manner.

12.2 Management service employee conduct expectations

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions, but that an objectively reasonable employer would not have removed Appellant from the management service for her actions regarding the lease, given Appellant's positive employment history. To varying degrees, the Commission proved some of the remaining charges. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including a failure to maintain a respectful workplace, retaliation, engaging in inappropriate conduct as a supervisor, and violation of various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, making inappropriate comments about the executive assistant in two emails to a forestry manager, removing duties from the executive assistant without prior notice or discussion, raising concerns about a motorcycle shed, and telling a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant's grievance processing duties. The Board rejected Appellant's argument that his violations of certain policies and procedures (related to smoking in vehicles and use of ATVs) were minor. Appellant's actions showed a "blatant disregard" for the Department's policies, which, as a manager, he was expected to enforce. Appellant failed to understand that his statements and conduct with regard to his subordinate "appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager." The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal

from classified service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In April 2011, while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. In late 2011, he was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, Appellant was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death, including ordering the overnight storage of the corpse in the infirmary food cooler. The Board rejected Appellant's arguments that he notified his superiors of the inmate death, as required, and that his actions did not violate any rule. Appellant's "role as the individual in charge of a prison of 3,000 inmates required more than just not violating those rules. [Appellant's] position required him to appropriately address unforeseen situations that were not explicitly provided for in prison work rules." Appellant's failure to involve his superiors in the decisions about how to handle the corpse "reflected a disregard of his place in the chain of command." During the events in question, Appellant was aware that his "emotional intelligence and judgment were in question." Appellant's failure to acknowledge his errors in prioritizing his activities, communicating with his superior officers, and appropriately handling the situation with the corpse "support the Department's theory that a significant level of discipline was required" to get Appellant's attention. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. In the presence of other employees, Appellant made a remark about a

waitress at a restaurant to the effect of, “I guess a blow job is out of the question, isn’t it?” Customers sitting nearby heard the remark and were offended. Appellant also made a remark to a subordinate, who had been dealing with his wife’s serious illness, to the effect of, “Why don’t you just shoot the bitch?” Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. An investigation of Appellant’s computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. The Department properly determined that Appellant “was not capable of performing his managerial duties, and that his ‘unfitness to render effective service’ was evident from his conduct,” and that removal from management service was appropriate. Moreover, the Department properly determined that the totality of Appellant’s conduct “amounted to misconduct that undermined the Department’s belief that he could faithfully perform the duties of his job” and “would not likely be improved with progressive measures,” and, therefore, dismissal from state service was also appropriate. The Board dismissed the appeal.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor’s degree. Appellant relied on a “degree” that he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. To obtain the “degree,” Appellant had sent documents to Rochville reflecting 15 credits he obtained in four classes and a certificate showing completion of 42 hours of instruction in limited maintenance electrician work from Chemeketa Community College. He had also sent a one-page summary of his work history and proof of attendance at several seminars. In exchange, Appellant received a diploma for a bachelor’s degree and an undated “transcript” listing 30 courses, the number of credit hours for each course, and his “grade” for each course. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a “life experience degree.” In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed “145 semester” units, and answering “yes” next to the question, “Did you graduate?” Appellant also misleadingly described his prior job positions. Appellant’s reliance on the Rochville University “degree” during his 2008 application, “while wrongful, was less deceptive than his subsequent conduct.” Appellant’s statements during his 2012 application were intentionally deceitful. Appellant’s reliance on the Rochville degree, his misstatements in his 2012 application, and his failure to acknowledge the wrongfulness of his actions “were inconsistent with his role as a human resource manager.” The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with

a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS Conflict of Interest policy and realized that he should have reported the relationship because it created a potential conflict of interest, even though the policy does not expressly require reporting of romantic relationships at work. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant's failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department's policies. Removal was consistent with ORS 240.570(3).

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. He also stated that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for failing to notify management of her relationship with the classified employee and of the potential conflicts of interest, and for making threats to the classified employee. Appellant "failed to exercise good judgment as a manager by failing to alert her supervisor to the conflicts that had developed which raised possible policy violations and potential liability for the Department and by threatening [the classified employee] regarding his intent to file a complaint." Removal from management service was appropriate. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager's directive and providing false or misleading information. The last chance agreement required Appellant to refrain

from inappropriate and unprofessional conduct and to adhere to DMV's supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow "proper conduct" as a unit manager. Appellant's removal resulted from her conduct at a meeting of both management and non-management employees tasked with developing interview questions for an informal interview process with candidates who were applying to replace a DMV manager. The first question discussed was submitted by Appellant: "Even the best bosses generate complaints from their employees now and then. What complaints would the people you've managed have about you?" Appellant told the group that the question was hers. Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question as proposed, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant's last chance agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, "[Y]ou have to go! You're off and we ain't payin' overtime!" DMV proved that Appellant acted in an unprofessional manner and violated the expectations in the last chance agreement. The Board determined that Appellant "failed to model conduct supporting DMV's team-oriented environment or behavior and showed no effort to resolve conflict in a positive manner or be flexible. She clearly did not meet the expectation of leading by example." The Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. After receiving verification of the child's head injuries, Appellant did not contact law enforcement or appropriate medical personnel, did not contact the child, did not travel to Portland, and did not ensure that a safety plan was in place. The potential consequences of Appellant's "non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act." The Board dismissed the appeal.

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department's Fiscal Manager, appealed a one-week unpaid suspension for poor performance. Hired in 2003, Appellant received two letters of reprimand (in 2008 and in 2010), received "needs improvement" ratings on two performance evaluations, and received written expectations and a work plan for inaccurate work and inattention to detail. The Board concluded that Appellant (a) submitted a permanent finance plan for a reclassified position that contained significant errors, (b) submitted a financial year-end report/subrecipient report that she knew was likely to contain errors, (c) failed to follow up on the filing of a required quarterly report under the American Recovery and Reinvestment Act of 2009, and (d) gave her supervisor inaccurate information out of haste and ignorance regarding accounts receivable and forfeited vehicles. Some of Appellant's errors were "minor and unique," but others were examples of multiple failures to submit accurate information when accuracy was important. Viewing Appellant's actions in total, "against the background of her previous direction and reprimands," the Board concluded that "an objectively reasonable employer could have issued a one-week suspension under these circumstances." The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service and appealed. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. The employer's decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer's contracting function, which Appellant had committed to help the employer regain. Appellant's "failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility." Also, Appellant's actions "severely damaged the Department's ability to trust his judgment." The Board determined that Appellant failed to understand the nature and seriousness of his conduct, and his "failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards." The Board dismissed the appeal.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on administrative leave pending an investigation of a complaint that she had made against colleagues and subordinates. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but the instructions did not specifically tell her that she was also required to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not

respond to emails from management about the project's progress. The Department charged Appellant with insubordination and suspended Appellant for one week. The Board determined that Appellant had engaged in "unacceptable behavior" in failing to complete the project, but that the Department had failed to prove a charge of insubordination because the Department did not warn Appellant that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand.

12.3.1 Dismissal (see also 12.3.8)

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her twelve years of prior satisfactory service precluded discipline. The Board concluded that "these factors are irrelevant" because she was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. Hired into the classified service in 1999, Appellant was promoted to the management service in 2001. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the

conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant's failure to take any action was "clearly unreasonable." Appellant's failure to act allowed an unacceptable "pattern of improper harassment to continue for a long period." Through his conduct and his "unpersuasive explanation for his conduct," Appellant demonstrated that he was unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department's charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded that the Department was reasonable in removing Appellant from the management service. Moreover, Appellant engaged in misconduct. The Board rejected Appellant's contentions that her instant messages were private and that her actions were not willful. In light of Appellant's prior discipline, the Department acted reasonably in dismissing Appellant from state service. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions, but that an objectively reasonable employer would not have removed Appellant from the management service for her actions regarding the lease, given Appellant's

positive employment history. To varying degrees, the Commission proved some of the remaining charges, including charges that Appellant (1) did not make available the procedures to be followed in the event that the security alarm was triggered, (2) failed to have employees who were issued cell phones after 2011 sign user agreements, (3) was negligent in not providing meaningful feedback regarding an organizational chart sent to her for review by a Department of Administrative Services employee, and (4) failed to hold and document quarterly safety committee meetings. The Commission failed to prove charges that Appellant (1) failed to implement procedures for a panic alarm, (2) failed to properly catalog a personal service contract by logging and storing it with an executive secretary's personal service contracts, (3) failed to take the initiative to plan a meaningful Administrative Services Team meeting in August 2013, (4) failed to effectively administer human resources for OIB, (5) failed to ensure that OIB had an appropriate subminimum wage certificate in effect from 2011 to 2013, (6) failed to accurately prepare OIB budget and fiscal information, and (7) engaged in inappropriate work activity while on administrative leave. Appellant's removal violated ORS 240.570(3). Appellant had been employed for approximately seven years without any disciplinary action. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from classified service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, Appellant, while off duty, was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report a DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, Appellant's failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. The Board dismissed the appeal.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor's degree. Appellant relied on a "degree" he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a "life experience degree." In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed "145 semester" units, and answering "yes" next to the question, "Did you graduate?" He included other deceptive or false statements regarding previous employment reported on his job application. During the investigation, Appellant claimed that his 2012 statements in his application were the result of inattention on his part. He also contended that the degree mill was "accredited" by two online accreditation organizations. Appellant's reliance on the Rochville University "degree" during his 2008 application, "while wrongful, was less deceptive than his subsequent conduct." Appellant's statements during his 2012 application were intentionally deceitful. Appellant's reliance on the Rochville degree, his misstatements in his 2012 application, and his failure to acknowledge the wrongfulness of his actions "were inconsistent with his role as a human resource manager." The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS Conflict of Interest policy, even though it does not expressly require reporting of romantic relationships at work, and realized that he should have reported the relationship because it created a potential conflict of interest. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant's failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department's policies. Removal was consistent with ORS 240.570(3). Although Appellant committed misconduct, the Board ordered the Department to reinstate Appellant to classified service in light of his length of state service and lack of previous discipline.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. After receiving verification of the child's head injuries, Appellant did not contact law enforcement or appropriate medical personnel, did not contact the child, did not travel to Portland, and did not ensure that a safety plan was in place. The potential consequences of Appellant's "non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act."

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. The employer's decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer's contracting function, which Appellant had committed to help the employer regain. Appellant's "failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility." Also, Appellant's actions "severely damaged the Department's ability to trust his judgment." The Board determined that Appellant failed to understand the nature and seriousness of his conduct, and his "failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards." The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service. The Board dismissed the appeal in part, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. The Board applied a "reasonable employer" standard, which involves an objective evaluation of all circumstances of the removal or dismissal to determine whether the employer's action was objectively reasonable, citing *Brown v. Oregon College of Education*, 52 Or App 251, 260-61, 628 P2d 410 (1981). 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," quoting *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). In applying the reasonable employer standard, the Board scrutinizes a dismissal from state service more stringently and under rules that are substantially different from those governing removal from management service. Charges that are adequate to support removal from management service may not be sufficient to justify dismissal from state service. Applying the reasonable employer standard, the Board determined whether Appellant was unwilling or unable to fully and faithfully perform the duties of the position satisfactorily. A manager is held to high standards, although those standards must not be arbitrary or unreasonable. Here, Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." An important consideration in the Board's review of a removal from management service is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. The Board determined that removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board dismissed the appeal.

12.3.2 Constructive discharge/discipline

Miller v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-10-10 (April 2011): Principal Executive Manager B appealed the Department's refusal to allow her to rescind her resignation. The Board held that, pursuant to ORS 240.570(2), it had no jurisdiction over the Department's refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. To establish a constructive discharge, the appellant must prove (1) that the employer deliberately created or deliberately maintained the working condition(s), (2) with the intention of forcing the employee to leave the employment, and (3) that the employee left the employment because of the working conditions. The working conditions that spark the constructive discharge must be so intolerable that a reasonable person in the employee's position would have resigned, citing *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), and *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995). See also *Holley v. Department of Environmental Quality*, Case Nos. MA-9/13-89 (April 1990). Appellant alleged that the Department misled her as to the amount of family leave to which she was entitled (pursuant to the Family and Medical Leave Act (FMLA)), transferred her into a position in which she supervised fewer employees, and required her to begin her work day at a time that interfered with her child care arrangements. These allegations were insufficient to demonstrate that the Department deliberately created intolerable working conditions with the intention of forcing Appellant to leave or that Appellant left work because of these conditions.

12.3.3 Trial service removal

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution appealed a written reprimand and removal from the Tactical Emergency Response Team, resulting in loss of a four percent pay differential. Appellant received the discipline during trial service in the management service. Due to the issuance of the written reprimand, Appellant was removed from management promotional trial service and returned to the rank of sergeant. The Board noted that the removal from management trial service itself could not be (and was not) appealed, citing *Tucker v. Department of Human Services*, Case No. MA-06-11 at 2 (September 2011). The Board dismissed the appeal.

Moll v. Parks and Recreation Department, Case No. MA-009-13 (October 2013), recons (December 2013): Appellant appealed his restoration to the classified service after removal from the management service, arguing that he should have been demoted from his prior position but not removed from the management service. Appellant held a regular status classified service position, and subsequently was appointed to the management service as a Park Manager 1. Appellant successfully completed the trial service period and attained regular status. Appellant was subsequently promoted to a Park Manager 2 position, subject to a trial service period. During this trial service period, the Department removed Appellant from management service pursuant to ORS 240.570(3) and restored him to the classified position. (The Department did not remove Appellant from trial service pursuant to ORS 240.410.) Appellant did not contest the basis for his removal from the management service, but argued that he was entitled to be returned to his

previous management service Park Manager 1 position because he was removed during the trial service period. The Board rejected this argument. The Department could, and did, remove Appellant from the management service pursuant to ORS 240.570(3) during trial service. When a management service employee with immediate prior regular status in the classified service is removed from the management service, the employee is returned to his last regular status position in the classified service. The Board rejected Appellant's argument that a regular status employee cannot be removed from the management service pursuant to ORS 240.570(3) during trial service. The Board reasoned that such an argument lacked supporting legal authority. The Board dismissed the appeal.

Culver v. Department of Human Services for Aging and People with Disabilities, Case No. MA-002-13 (May 2013): Employee appealed his removal from management trial service. The Board has consistently held that it has no authority to review appeals from management service employees who are removed during trial service. The Board dismissed the appeal.

Tucker v. Department of Human Services, Case No. MA-06-11 (September 2011): Principal Executive Manager D appealed his removal during trial service and restoration to classified service. Appellant contended that his removal violated the Department handbook, management service policy, the Oregon Revised Statutes, and federal constitutional protections. The Board dismissed, explaining that it had no authority to review a removal during a trial service period that has been established pursuant to rules enacted under ORS 240.250, citing numerous Board decisions, including *Taylor v. Department of Corrections*, Case No. MA-4-00 at 3 (May 2000).

12.3.4 Demotion within management service

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010) : Management service employee, a human resources manager, was suspended for one week without pay and demoted within the management service. The demotion was due to Appellant's conduct during a meeting where she was demeaning, critical and dismissive to other staff members, including her subordinates. The Board determined that the Department proved both charges. However, the Board determined that the level of discipline was not reasonable because the Department had failed to consider the principles of progressive discipline. The Board ordered the Department to convert the permanent demotion to a temporary demotion of two months. The Department moved for reconsideration, asserting that it could not comply with the Board's remedy because when Appellant returned to work, she was often absent, created a number of problems, and ultimately resigned. As a result, she worked only 12 hours during the month before resigning. The Board adhered to its prior order, reasoning that the Department's motion was based on evidence that was not part of the original record and the Department had not requested to reopen the record to admit that evidence. The Board also declined to reconsider other issues raised in the original order because those issues were already considered and decided in that prior order.

12.3.5 Removal from management service if “unable or unwilling” to perform (ORS 240.570(3))

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant’s lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney’s Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant’s direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her twelve years of prior satisfactory service precluded discipline. The Board concluded that “these factors are irrelevant” because she was not disciplined, but was “removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily.” The Board dismissed the appeal.

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff’d without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. Hired into the classified service in 1999, Appellant was promoted to the management service in 2001. One of Appellant’s subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious “male gay black lover” of EL, changing EL’s computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL’s car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant’s failure to take any action was “clearly unreasonable.” Appellant’s failure to act allowed an unacceptable “pattern of improper harassment to continue for a long period.” Through his conduct and his “unpersuasive explanation for his conduct,” Appellant demonstrated that he was unable or unwilling to fully and faithfully perform

the duties of the position satisfactorily. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions, but that an objectively reasonable employer would not have removed Appellant from the management service for her actions regarding the lease, given Appellant's positive employment history. To varying degrees, the Commission proved some of the remaining charges, including charges that Appellant (1) did not make available the procedures to be followed in the event that the security alarm was triggered, (2) failed to have employees who were issued cell phones after 2011 sign user agreements, (3) was negligent in not providing meaningful feedback regarding an organizational chart sent to her for review by a Department of Administrative Services employee, and (4) failed to hold and document quarterly safety committee meetings. The Commission failed to prove charges that Appellant (1) failed to implement procedures for a panic alarm, (2) failed to properly catalog a personal service contract by logging and storing it with an Executive Secretary's personal service contracts, (3) failed to take the initiative to plan a meaningful Administrative Services Team meeting in August 2013, (4) failed to effectively administer human resources for OIB, (5) failed to ensure that OIB had an appropriate subminimum wage certificate in effect from 2011 to 2013, (6) failed to accurately prepare OIB budget and fiscal information, and (7) engaged in inappropriate work activity while on administrative leave. Appellant's removal violated ORS 240.570(3). Appellant had been employed for approximately seven years without any disciplinary action. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor's degree. Appellant relied on a "degree" that he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a "life experience degree." In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed "145 semester" units, and answering "yes" to the question, "Did you graduate?" He included other deceptive or

false statements regarding previous employment reported on his job application. During the investigation, Appellant claimed that his 2012 statements in his application were the result of inattention on his part. He also contended that the degree mill was “accredited” by two online accreditation organizations. Appellant’s reliance on the Rochville University “degree” during his 2008 application, “while wrongful, was less deceptive than his subsequent conduct.” Appellant’s statements during his 2012 application were intentionally deceitful. Appellant’s reliance on the Rochville degree, his misstatements in his 2012 application, and his failure to acknowledge the wrongfulness of his actions “were inconsistent with his role as a human resource manager.” The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS Conflict of Interest policy, even though it does not expressly require reporting of romantic relationships at work, and realized that he should have reported the relationship because it created a potential conflict of interest. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant’s failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department’s policies. Removal was consistent with ORS 240.570(3).

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager’s directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV’s supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow “proper conduct” as a unit manager. Appellant’s removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant recommended the following question: “Even the best bosses generate complaints from their employees now and then. What complaints would the people you’ve managed have about you?” Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant’s last chance

agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, “[Y]ou have to go! You’re off and we ain’t payin’ overtime!” Appellant acted in an unprofessional manner and violated the last chance agreement. Appellant “failed to model conduct supporting DMV’s team-oriented environment or behavior and showed no effort to resolve conflict in a positive manner or be flexible. She clearly did not meet the expectation of leading by example.” The Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT’s regular screener at home to obtain the foster facility director’s cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. After receiving verification of the child’s head injuries, Appellant did not contact law enforcement or appropriate medical personnel, did not contact the child, did not travel to Portland, and did not ensure that a safety plan was in place. The potential consequences of Appellant’s “non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act.”

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers’ work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant’s actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. The employer’s decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer’s contracting function, which Appellant had committed to help the employer regain. Appellant’s

“failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility.” Also, Appellant’s actions “severely damaged the Department’s ability to trust his judgment.” The Board determined that Appellant failed to understand the nature and seriousness of his conduct, and his “failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards.” The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the appeal in part, but granted Appellant’s challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee’s sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. The Board applied a “reasonable employer” standard, which involves an objective evaluation of all circumstances of the removal or dismissal to determine whether the employer’s action was objectively reasonable, citing *Brown v. Oregon College of Education*, 52 Or App 251, 260-61, 628 P2d 410 (1981). Appellant engaged in a series of missteps that, “for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies.” An important consideration in the Board’s review of a removal from management service is the extent to which the employer’s trust and confidence in the employee have been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service for an inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the State proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. The Board determined that removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board dismissed the appeal.

**12.3.6 Removal from management service “due to reorganization or lack of work”
(ORS 240.570(2) nondisciplinary removal/layoff)**

Stigers v. Oregon Health Authority, Case No. MA-010-15 (May 2016): Appellant was in the management service and accepted a classified position in a bargaining unit in lieu of layoff. Appellant appealed the layoff decision, arguing that it violated ORS 240.560 and ORS 240.570. In layoff cases, the appellant bears the burden of proof to demonstrate that the layoff was done in bad faith. The Board will not second guess an employer’s decision to reorganize and lay off management service employees unless there is evidence of another motivation for the layoff or termination. Here, the Oregon Health Authority made significant changes to its overall organizational structure, reducing the number of units reporting to the director from 18 to 7. The agency simultaneously abolished approximately 30 management service positions. The employer adequately explained that it sought to reduce double-filled positions, reduce the use of limited duration appointments, and minimize duplicated efforts. The employer also presented a credible explanation for why management service, rather than classified, positions were abolished. The Board dismissed the appeal.

Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016): Principal Executive Manager D, a section manager for the Oregon Medical Marijuana Program, appealed her removal from the management service as a result of a reorganization and layoff at the Oregon Health Authority (OHA). “To be legitimate, a reorganization must be rational and bona fide from inception to implementation. It must be made in good faith, and it must advance the efficiency and effectiveness of the organization. A legitimate reorganization is not contrived or a sham for some other purpose. In a given organization, numerous different forms of reorganization may be legitimate,” citing *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998). As a result of a comprehensive review of positions, OHA’s agency director determined that there were significant inefficiencies and overlaps among management service workers as a result of the combination of programs that had been added to the agency. The agency implemented a reorganization, which reduced the number of OHA divisions from 18 to 7. In addition, the legalization of recreational marijuana in 2015 affected Appellant’s section because OHA was required to oversee non-medicinal consumer sales and consumption. Appellant’s section expanded as a result of recreational marijuana legalization and was restructured to be managed by a Principal Executive Manager (PEM) F manager. OHA also added two PEM E positions and determined that a PEM D manager position was no longer necessary. Appellant argued that her layoff was based on her race, gender, disability, medical leave status or age. Appellant failed to meet her burden to show that the reorganization was unlawfully discriminatory or otherwise illegitimate or in bad faith. The elimination of Appellant’s position was based on structural considerations, and Appellant’s PEM D position did not fit within OHA’s new structure. The Board dismissed the appeal.

Bathke v. Oregon Health Authority, Case No. MA-012-15 (March 2016): Principal Executive Manager E appealed her removal from the management service because of a reorganization and layoff. OHA’s agency director instructed her reports to stop extending limited

duration appointments, to determine how many employees were assigned to each legislatively approved position, to examine work that was being duplicated, and to identify managerial positions that could be eliminated. As a result of the review, OHA implemented a reorganization, which reduced the number of OHA divisions from 18 to 7. Appellant's Principal Executive Manager E position was eliminated. Appellant's previously held Operations and Policy Analyst 4 position was also eliminated. Consequently, Appellant was informed that she could be restored to her classified Operations and Policy Analyst 2 position, which she accepted. The Board concluded that Appellant's removal from the management service complied with ORS 240.570(2). OHA underwent a substantial reorganization, resulting in the elimination of over 20 managerial positions. Appellant alleged that she was chosen for layoff because she had declined the Oregon State Hospital Director's suggestion that she work in his office as executive assistant or because of her personal romantic relationship with another employee. Appellant failed, however, to present sufficient evidence to substantiate her claims. Moreover, almost a year elapsed after Appellant's announcement of her personal relationship, and even longer after Appellant declined to consider the executive assistant position. The Board dismissed the appeal.

Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016): Principal Executive Manager E appealed her removal from the management service as a result of a reorganization and layoff at the Oregon Health Authority (OHA). Appellant was restored to a classified position, resulting in a reduction in salary. OHA made significant changes to its overall organizational structure, reducing the number of units reporting to the director. Appellant argued that the reorganization included a number of alleged problems, including that (1) she was called into the layoff announcement meeting without prior notice; (2) she was given until only noon the same day to decide whether to accept a classified position; (3) OHA failed to give her a copy of the agreement she signed; (4) OHA categorized her separation in multiple ways; (5) there was a past practice of "red circling" the wages of managers moved into classified positions, but Appellant's salary was not "red circled"; and (6) she continued performing the same work after the position change, except that she no longer attended management meetings. Appellant failed to meet her burden to show that the reorganization, as it affected her, was in bad faith or was not legitimate. Although Appellant believed that she was given only until noon the same day to agree to restoration to the classified service, the remainder of the evidence indicated that she was given multiple days. Further, there was no evidence that OHA managers' use of terms such as "layoff" or "restoration to the classified service" were inconsistent or contradictory as applied to Appellant. There was also no evidence that Appellant's reduction in salary was inconsistent with the treatment of similarly situated individuals or that the reduction was not part of a legitimate reorganization. The Board dismissed the appeal.

Weston v. Oregon Health Authority, Case No. MA-015-15 (November 2015): Principal Executive Manager D appealed the abolishment of her position as a result of a reorganization at the Oregon Health Authority. The reorganization resulted in Appellant's placement in an Operations and Policy Analyst 3 position in the classified service. Appellant did not challenge the removal itself. Instead, Appellant challenged the reduction in salary resulting from her placement in a classified service position. Reduction in salary as a result of placement in the classified service

is not one of the management service personnel actions listed in ORS 240.570 that can be appealed. The Board dismissed the appeal for lack of jurisdiction.

Wilaby v. Oregon Military Department, Case No. MA-039-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant sought restoration of her vacation accrual rate and a one-half step salary increase. Appellant's position was changed pursuant to House Bill 2020, which required certain state agencies to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work. The Board dismissed the appeal for lack of jurisdiction.

Albertson v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-036-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant sought restoration of her vacation accrual rate and a one-half step salary increase. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work. The Board dismissed the appeal for lack of jurisdiction. For other opinions stating the same conclusion, see also *Holton v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-037-12 (January 2013); *Hill v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-035-12 (January 2013); *Shoff v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-034-12 (January 2013); *McMillion v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-033-12 (January 2013); *Maceira-Klever v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations*, Case No. MA-032-12 (January 2013).

Rux v. Oregon Health Authority, Case No. MA-08-12 (December 12, 2012), nunc pro tunc order (December 14, 2012): Operations Policy Analyst 3 (OPA 3) appealed her layoff from the management service. In an earlier appeal to ERB, Appellant appealed a demotion and was restored to the OPA 3 position as a result of a mediated settlement. Thereafter, the Oregon legislature reduced the budget for Healthy Kids, the program in which Appellant worked. The OHA director told the Administrator of Healthy Kids to implement the reduction and, if layoffs were required, to lay off union-represented employees only as a last resort. There were two OPA 3 positions; the position not held by Appellant was a union-represented position. The Healthy Kids Administrator chose to eliminate a Public Affairs Specialist position and Appellant's OPA 3 position. Applying a deferential standard of review, the Board concluded that there was no evidence that OHA departed from the director's criteria or agency rules regarding selection of positions for layoff. Healthy Kids had sustained a significant budget reduction and the Administrator determined that the reduction could not be implemented without eliminating two positions. The Board concluded that there was no evidence to support Appellant's arguments that

the layoff was a pretext for removing her for cause or was retaliation for her earlier ERB appeal. The Board dismissed the appeal.

Harper v. Oregon Parks and Recreation Department, Case No. MA-029-12 (November 2012): Safety Specialist 2 appealed a nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that her position warranted a management service classification, and that changing the classification created “an inconsistency with other state agency positions performing the same work” and harmed her and the work unit. ORS 240.570 “does not provide for an appeal regarding either the change in position status or the designation of one’s position as management or classified service.” The Board dismissed the appeal for lack of jurisdiction.

Nichols v. Oregon Health Authority, Oregon State Hospital, Case No. MA-030-12 (November 2012): Executive Support Specialist II appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that she could not “perform the duties of her position as a classified represented employee.” Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. Instead, she was removed due to “OHA’s determination that her position status did not warrant remaining in the management service.” The Board dismissed the appeal for lack of jurisdiction.

Brosmore v. Oregon Youth Authority, Case No. MA-027-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

True v. Oregon Youth Authority, Case No. MA-026-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization

or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012): Project Manager 3 appealed her nondisciplinary removal from the management service and placement in a union-represented Project Manager 3 position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant asked the Board “to reclassify her current represented position, restore her previous salary level and reconsider her position’s duties and expectations.” With respect to employees in the classified service, however, the Board may “only review personnel actions that affect employees who are not in a certified or recognized bargaining unit.” Because Appellant’s position was in a bargaining unit, the Board dismissed the appeal for lack of jurisdiction.

Morin v. Department of Administrative Services, Case No. MA-020-12 (November 2012): Principal Executive Manager A appealed the reclassification of her position due to a reorganization to Accounting Technician 3, a classified represented position. The Board has no statutory authority to review whether a reclassification has resulted in the appropriate union-represented classification, citing *Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division*, Case No. MA-13-92 (May 1993), *recons* (June 1993), *rev’d and rem’d*, 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). The Board dismissed the appeal.

Holcomb v. Oregon Health Authority, Case No. MA-13-11 (April 2012): Appellant was notified on August 5, 2011, that he would be laid off effective September 30, 2011, because his position was being eliminated. He filed an appeal on September 2, 2011. The administrative law judge informed him that the appeal was premature because the layoff had not yet taken place, but that Appellant could renew his appeal once the layoff became effective. In March 2012, the administrative law judge wrote to Appellant inquiring about the status of the matter. Appellant did not respond. The Board dismissed for failure to pursue the appeal.

12.3.7 Removal from management service with restoration to classified service

Bathke v. Oregon Health Authority, Case No. MA-012-15 (March 2016): Principal Executive Manager E appealed her removal from the management service because of a reorganization and layoff. As a result of a reorganization, Appellant was informed that she could be restored to her classified Operations and Policy Analyst 2 position, which she accepted. The Board concluded that Appellant’s removal from the management service and restoration to the classified service should be analyzed under ORS 240.570(2), which addresses non-disciplinary personnel actions, not ORS 240.570(3), which addresses when management service employees may be disciplined. Appellant’s personnel actions “in reality consisted of two simultaneous layoffs and an ORS 240.570(5) restoration.” Under the deferential standard used in reorganization cases,

Appellant's removal from the management service and restoration to the classified service complied with ORS 240.570(2). The Board dismissed the appeal.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including failing to maintain a respectful workplace, retaliating against an employee, engaging in inappropriate conduct as a supervisor, and violating various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, making inappropriate comments about the executive assistant in two emails to a forestry manager, removing the executive assistant's inmate grievance processing duties without prior notice or discussion, raising concerns about a motorcycle shed, and telling a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant's grievance processing duties. The Board rejected Appellant's argument that his violations of certain policies and procedures (related to smoking in vehicles and use of ATVs) were minor. Appellant's actions showed a "blatant disregard" for the Department's policies, which, as a manager, he was expected to enforce. Appellant failed to understand that his statements and conduct with regard to his subordinate "appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager." Although the Board considered Appellant's length of service, it noted that he had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant's actions on the Department. The Board dismissed the appeal.

Moll v. Parks and Recreation Department, Case No. MA-009-13 (October 2013), recons (December 2013): Appellant appealed his restoration to the classified service after removal from the management service, arguing that he should have been demoted from his prior position but not removed from the management service. Appellant held a regular status classified service position, and subsequently was appointed to the management service as a Park Manager 1. Appellant successfully completed the trial service period and attained regular status. Appellant was subsequently promoted to a Park Manager 2 position, subject to a trial service period. During this trial service period, the Department removed Appellant from management service pursuant to ORS 240.570(3) and restored him to the classified position. (The Department did not remove Appellant from trial service pursuant to ORS 240.410.) Appellant did not contest the basis for his removal from the management service, but argued that he was entitled to be returned to his previous management service Park Manager 1 position because he was removed during the trial service period. The Board rejected this argument. The Department could, and did, remove Appellant from the management service pursuant to ORS 240.570(3) during trial service. When a management service employee with immediate prior regular status in the classified service is removed from the management service, the employee is returned to his last regular status position in the classified service. The Board rejected Appellant's argument that a regular status employee

cannot be removed from the management service pursuant to ORS 240.570(3) during trial service. The Board observed that such an argument lacked supporting legal authority. The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS Conflict of Interest policy, even though it does not expressly require reporting of romantic relationships at work, and realized that he should have reported the relationship because it created a potential conflict of interest. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant's failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department's policies. Removal was consistent with ORS 240.570(3). The Board granted the appeal with respect to dismissal from the classified service, however. A reasonable employer would not have dismissed Appellant in light of his lack of discipline during more than 10 years of state service and the fact that he did not show favoritism toward his partner or attempt to conceal the relationship. Although Appellant committed misconduct, the Board ordered the Department to reinstate Appellant to the classified service.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at the classified employee's house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. Appellant threatened to report the classified employee's friend, a police officer, to his supervisor, and did so. In a subsequent text message, Appellant told the classified employee that he was "immature and really not a man" and that he was "dead" to her. In subsequent communications between them, the classified employee again stated that he might go to human resources. Appellant wrote to the employee that she would "defend herself to the end" and told him to stop and move on with his life. The classified employee told Appellant that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in

the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on that panel, and did not report the events or remove herself from the panel. The Department removed Appellant from management service for, in part, making threats against the classified employee, including threats about his stated intention to consult human resources. The Board concluded that removal was appropriate, rejecting Appellant's "assertion that she was merely defending herself." Such an assertion, the Board reasoned, "completely discounts the fact that she was a high level manager making these statements to a classified employee in relation to a work-related matter, *i.e.*, his right to file a complaint for policy violations." Appellant was a "manager and by deciding to become sexually involved with a classified employee, she knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an obligation to notify her supervisor as soon as she became aware that such an impact existed." The Board wrote that Appellant "never understood her role as a manager or lost her perspective regarding that role, and let her concerns about her privacy override her obligations at work." Removal from management service was appropriate. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service and return to the classified service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager's directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV's supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow "proper conduct" as a unit manager. Appellant's removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant recommended the following question: "Even the best bosses generate complaints from their employees now and then. What complaints would the people you've managed have about you?" Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant's last chance agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, "[Y]ou have to go! You're off and we ain't payin' overtime!" Appellant acted in an unprofessional manner and violated the last chance agreement. Appellant "failed to model conduct supporting DMV's team-oriented environment or behavior and showed no effort to resolve conflict in a positive manner or be flexible. She clearly did not meet the expectation of leading by example." The Board dismissed the appeal.

**12.3.8 Removal from management service and discipline in classified service
(see also 11.2)**

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant's failure to take any action was "clearly unreasonable." Appellant's failure to act allowed an unacceptable "pattern of improper harassment to continue for a long period." Through his conduct and his "unpersuasive explanation for his conduct," Appellant demonstrated that he was unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department's charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded that the Department was reasonable in removing Appellant from the management service. Moreover, Appellant engaged in misconduct. The Board rejected Appellant's contentions that her instant messages were private and that her actions were not willful. In light of Appellant's prior discipline, the Department acted reasonably in dismissing Appellant from state service. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the

Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because she committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, Appellant's failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Appellant's conduct also constituted misconduct because her conduct was unlawful and the result of willful intentional actions. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and he supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, "I guess a blow job is out of the question, isn't it?" Customers sitting nearby heard the remark and were offended. Appellant also made a remark to a subordinate, who had been dealing with his wife's serious illness, to the effect of, "Why don't you just shoot the bitch?" Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from the management service and dismissal from state service were appropriate, even though Appellant had no prior discipline in 11 years of state service. The

Department properly determined that Appellant “was not capable of performing his managerial duties, and that his ‘unfitness to render effective service’ was evident from his conduct.” Moreover, the Department properly determined that the totality of Appellant’s conduct “amounted to misconduct that undermined the Department’s belief that he could faithfully perform the duties of his job” and “would not likely be improved with progressive measures,” and, therefore, dismissal from state service was also appropriate. The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS Conflict of Interest policy, even though it does not expressly require reporting of romantic relationships at work, and realized that he should have reported the relationship because it created a potential conflict of interest. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant’s failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department’s policies. Removal was consistent with ORS 240.570(3). The Board granted the appeal with respect to dismissal from the classified service, however. A reasonable employer would not have dismissed Appellant in light of his lack of discipline during more than 10 years of state service and the fact that he did not show favoritism toward his partner or attempt to conceal the relationship. Although Appellant committed misconduct, the Board ordered the Department to reinstate Appellant to the classified service.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from the management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at the classified employee’s house after work. The classified employee said, “I’m this close to going to Human Resources.” Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. Appellant threatened to report the classified employee’s friend, a police officer, to his supervisor, and did so. In a subsequent text message, Appellant told the classified employee that he was “immature and really not a man” and that he was “dead” to her. In subsequent communications between them, the classified employee again stated that he might go to human

resources. Appellant wrote to the employee that she would “defend herself to the end” and told him to stop and move on with his life. The classified employee told Appellant that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for Appellant’s failure to notify management of her relationship with the classified employee and of the potential conflicts of interest it created, and for making threats to the classified employee in response to his statements about going to human resources for assistance. The Board wrote that Appellant “never understood her role as a manager or lost her perspective regarding that role, and let her concerns about her privacy override her obligations at work.” Removal from the management service was appropriate. The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): A Principal Executive Manager C appealed her removal from the management service and dismissal from state service. Appellant, although not personally biased, had told a subordinate that an employee’s sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. The Board applied a “reasonable employer” standard, which involves an objective evaluation of all circumstances of the removal or dismissal to determine whether the employer’s action was objectively reasonable. Applying the reasonable employer standard, the Board scrutinizes a dismissal from state service more stringently and under rules that are substantially different from those governing removal from management service. Charges that are adequate to support removal from management service may not be sufficient to justify dismissal from state service. A manager is held to high standards, although those standards must not be arbitrary or unreasonable. Here, Appellant engaged in a series of missteps that, “for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies.” The Department’s decision to dismiss was based not only on her statements, but “on its fear of a discrimination claim. Although the concern was legitimate, and her removal from management service appropriate, Garrett’s conduct was not so gross that mitigating circumstances can be ignored.” An important consideration in the Board’s review of a removal from management service is the extent to which the employer’s trust and confidence in the employee have been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984). The Board dismissed with respect to the management service claim, but granted Appellant’s challenge of her dismissal from state service on the basis of misconduct.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest

in the disciplinary process. The Board concluded that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did not work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. In the case of an “employee with law enforcement responsibilities, an employer can reasonably expect that the employee will avoid conduct that would place their personal integrity in question or bring discredit on their commission as a law enforcement officer,” citing *Duncan v. Department of Agriculture*, Case No. MA-01-91 (1992), and *Hunter v. OSU*, Case No. MA-3-88 (1989), *aff’d*, 100 Or App 261, *rev den*, 309 Or 698 (1990). The Board dismissed the appeal.

12.3.9 Suspension

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant’s knowledge of OIB’s ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director’s predecessor. The Board concluded that there was some merit to both parties’ positions, but that an objectively reasonable employer would not have removed Appellant from the management service for her actions regarding the lease, given Appellant’s positive employment history. To varying degrees, the Commission proved some of the remaining charges, including charges that Appellant (1) did not make available the procedures to be followed in the event that the security alarm was triggered, (2) failed to have employees who were issued cell phones after 2011 sign user agreements, (3) was negligent in not providing meaningful feedback regarding an organizational chart sent to her for review by a Department of Administrative Services employee, and (4) failed to hold and document quarterly safety committee meetings. The Commission failed to prove charges that Appellant (1) failed to implement procedures for a panic alarm, (2) failed to properly catalog a personal service contract by logging and storing it with an executive secretary’s personal service contracts, (3) failed to take the initiative to plan a meaningful Administrative Services Team meeting in August 2013, (4) failed to effectively administer human resources for OIB, (5) failed to ensure that OIB had an appropriate subminimum wage certificate in effect from 2011 to 2013, (6) failed to accurately prepare OIB budget and fiscal information, and (7) engaged in inappropriate work activity while on administrative leave. Appellant’s removal violated ORS 240.570(3). Appellant had been employed for approximately seven years without any disciplinary action. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the

Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. In late 2011, he was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, Appellant was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death, including storing the corpse overnight in the infirmary food cooler. The Board rejected Appellant's arguments that he notified his superiors of the inmate death, as required, and that his actions did not violate any rule. Appellant's "role as the individual in charge of a prison of 3,000 inmates required more than just not violating those rules. [Appellant's] position required him to appropriately address unforeseen situations that were not explicitly provided for in prison work rules." Appellant's failure to involve his superiors in the decisions about how to handle the corpse "reflected a disregard of his place in the chain of command." During the events in question, Appellant was aware that his "emotional intelligence and judgment were in question." Moreover, his failure to acknowledge errors in prioritizing his activities, communicating with his superior officers, and appropriately handling the situation with the corpse "support the Department's theory that a significant level of discipline was required" to get Appellant's attention. The Board dismissed the appeal.

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department's Fiscal Manager, appealed a one-week unpaid suspension for poor performance. Hired in 2003, Appellant received two letters of reprimand (in 2008 and in 2010), received "needs improvement" ratings on two performance evaluations, and received written expectations and a work plan for inaccurate work and inattention to detail. The Board concluded that Appellant (a) submitted a permanent finance plan for a reclassified position that contained significant errors, (b) submitted a financial year-end report/subrecipient report that she knew was likely to contain errors, (c) failed to follow up on the filing of a required quarterly report under the American Recovery and Reinvestment Act of 2009, and (d) gave her supervisor inaccurate information out of haste and ignorance regarding accounts receivable and forfeited vehicles. Some of Appellant's errors were "minor and unique," but others were examples of multiple failures to submit accurate information when accuracy was important. Viewing Appellant's actions in total, "against the background of her previous direction and reprimands," the Board concluded that "an objectively reasonable employer could have issued a one-week suspension under these circumstances." The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board determined

that the level of discipline was objectively reasonable despite Appellant's agency work since 2003 without previous discipline—because of Appellant's preferential treatment of his personal friend, the volume of non-business related emails, the content of the emails (together reflecting a gross disregard of the agency's policies), and the similar discipline meted out in a comparable situation. The Board was also troubled by Appellant's lack of understanding of his obligations as a manager because, during the investigation, the agency gave Appellant multiple opportunities to respond to the charges, but Appellant refused, or was unable, to recognize that he did anything wrong; the Board concluded that Appellant's responses made it unlikely that his conduct would be improved by lesser progressive discipline. The Board dismissed the appeal.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant Manager appealed a one-week disciplinary suspension. The Board determined that the Department had both proven the charges and imposed reasonable discipline proportionate to the offense. The Department charged that Appellant had violated policy and exercised poor judgment when she (1) asked an employee in another department to access and provide her with confidential information about a job applicant; (2) provided that employee with an email that disparaged two employees under her supervision by referring to them as racists; and (3) failed to address a potentially discriminatory situation with respect to those employees. The Board dismissed the appeal.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on administrative leave pending an investigation of a complaint that she had made against colleagues and subordinates. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but the instructions did not specifically tell her that she was also required to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not respond to emails from management about the project's progress. The Department charged Appellant with insubordination and suspended Appellant for one week. The Board determined that Appellant engaged in "unacceptable behavior" in failing to complete the project, but the Department failed to prove a charge of insubordination because the Department did not warn Appellant that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand.

12.3.10 Reduction in pay

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Hired in 2000 as a classified correctional officer, Appellant was promoted to the management service in February 2014. Appellant was having a secret extramarital

affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. Appellant was evasive during the investigation, violated the Department's respectful workplace policy by using pet names with a subordinate, and failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of the investigation. Appellant was a long-term employee with excellent performance reviews and no prior discipline. A written reprimand, including the loss in pay due to the removal from TERT, was a reasonably proportionate response to Appellant's conduct. The Board dismissed the appeal.

12.3.11 Reprimand

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The

Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. The Board analyzed the reprimand and removal from TERT as one disciplinary action reviewable under ORS 240.570(3) because the disciplinary document contained the reprimand and notified Appellant of his removal from TERT, based on the same facts and reasons. Here, Appellant was evasive during the investigation, violated the Department's respectful workplace policy by using pet names with a subordinate, and failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of the investigation. Appellant was a long-term employee with excellent performance reviews and no prior discipline. A written reprimand, including the removal from TERT, was a reasonably proportionate response to Appellant's conduct. The Board dismissed the appeal.

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services Program supervisor appealed a written reprimand. The Department charged Appellant with reinstating a father's supervised visits with his child, who was in the Department's custody, without first consulting with the case notes, the Department's case database, or the caseworker assigned to the family. The father's visits were suspended shortly thereafter, then reinstated, then ultimately suspended again after he arrived at one visit under the influence of drugs and then missed consecutive visits. The Department also charged Appellant with failing to return a telephone call from a Court Appointed Special Advocate. The Department proved the first charge, regarding Appellant's reinstatement of a father's supervised visits, but failed to prove the second charge. With regard to the second charge, Appellant did not detect urgency when she was informed about the telephone message, so she did not return the call to the Court Appointed Special Advocate because she had called others involved in the matter and believed that the situation had been resolved. A reprimand was appropriate. Appellant was hired in 2000, and promoted to the management service in 2007. The Board rejected Appellant's argument that the Department's expectations were required to be codified in a formal policy. As "a management service employee with significant responsibilities and experience, the Department could reasonably expect that Appellant would read pertinent information on the case and talk with the caseworker before making the decision that she did." The Board ordered the Department to withdraw the reprimand letter and reissue it without reference to the charge that the Department did not prove.

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): Appellant, a management service employee, appealed his reprimand for writing an

email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. Appellant printed the email, and it became intermixed with other documents and was discovered by a targeted colleague, who brought the email to management's attention. The Department then disciplined Appellant by issuing a letter of reprimand. Appellant argued that a reprimand was excessive. The Board held that the Department was objectively reasonable and the reprimand was proportionate. The Board concluded that Appellant had received clear notice regarding the Department's expectations of professional conduct in the workplace and Appellant had admitted that his conduct was unprofessional. Further, the Board also considered the minor nature of the offense and the lack of prior discipline.

12.3.13 Assignment and reassignment

Keller v. Department of Transportation, Case No. MA-007-10 (December 2010): Regional Manager for Maintenance and Operations appealed her reassignment from Region 1 (representing the Portland metro area) to Region 2 (representing the Salem metro area). Appellant was reassigned from Region 1 on the same day as another employee with whom she had experienced a protracted hostile relationship. The conflict between them had been so significant that it negatively affected the working operations of Region 1. Both employees had filed hostile work environment claims against the other, with Appellant filing the most recent before the reassignments. Appellant claimed that her reassignment was retaliatory due to her complaint. The Board determined that the Department established that the reassignment was for the good of the service because there was a rational basis for the Department's action. The Board determined that despite the Department's repeated efforts to facilitate reconciliation, Appellant and the other employee had a disruptive effect on other employees, interrupting the flow of communications regarding maintenance operations.

12.3.14 Classification/allocation of position

Wilaby v. Oregon Military Department, Case No. MA-039-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant's position was changed pursuant to House Bill 2020, which required certain state agencies to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work, and therefore the Board dismissed the appeal for lack of jurisdiction.

Albertson v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-036-12 (January 2013): Appellant alleged that the Department unlawfully re-designated her position from management service to classified service. Appellant sought restoration of her vacation accrual rate and a one-half step salary increase. Although Appellant was removed from the management service, she was not removed due to reorganization or lack of work. The Board dismissed the appeal for lack of jurisdiction. For other opinions stating the same conclusion, see also *Holton v. Oregon Department*

of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-037-12 (January 2013); Hill v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-035-12 (January 2013); Shoff v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-034-12 (January 2013); McMillion v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-033-12 (January 2013); Maceira-Klever v. Oregon Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-032-12 (January 2013).

Harper v. Oregon Parks and Recreation Department, Case No. MA-029-12 (November 2012): Safety Specialist 2 appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that her position warranted a management service classification, and that changing the classification created “an inconsistency with other state agency positions performing the same work,” and harmed her and the work unit. ORS 240.570 “does not provide for an appeal regarding either the change in position status or the designation of one’s position as management or classified service.” The Board dismissed the appeal for lack of jurisdiction.

Nichols v. Oregon Health Authority, Oregon State Hospital, Case No. MA-030-12 (November 2012): Executive Support Specialist II appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that she could not “perform the duties of her position as a classified represented employee.” Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. Instead, she was removed due to “OHA’s determination that her position status did not warrant remaining in the management service.” The Board dismissed the appeal for lack of jurisdiction.

Brosmore v. Oregon Youth Authority, Case No. MA-027-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

True v. Oregon Youth Authority, Case No. MA-026-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012): Project Manager 3 appealed her nondisciplinary removal from the management service and placement in a union-represented Project Manager 3 position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant asked the Board “to reclassify her current represented position, restore her previous salary level and reconsider her position’s duties and expectations.” With respect to employees in the classified service, however, the Board may “only review personnel actions that affect employees who are not in a certified or recognized bargaining unit.” Because Appellant’s position was in a bargaining unit, the Board dismissed the appeal for lack of jurisdiction.

Morin v. Department of Administrative Services, Case No. MA-020-12 (November 2012): Principal Executive Manager A appealed the reclassification of her position due to a reorganization to Accounting Technician 3, a classified represented position. The Board has no statutory authority to review whether a reclassification has resulted in the appropriate union-represented classification, citing *Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division*, Case No. MA-13-92 (May 1993), *recons* (June 1993), *rev’d and rem’d*, 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). The Board dismissed the appeal.

Holcomb v. Oregon Health Authority, Case No. MA-13-11 (April 2012): Appellant was notified on August 5, 2011, that he would be laid off effective September 30, 2011, because his position was being eliminated. He filed an appeal on September 2, 2011. The administrative law judge informed him that the appeal was premature because the layoff had not yet taken place, but that Appellant could renew his appeal once the layoff became effective. In March 2012, the administrative law judge wrote to Appellant inquiring about the status of the matter. Appellant did not respond. The Board dismissed the appeal for failure to pursue the appeal.

12.3.15 Performance appraisal

Jackson v. Business Development Department, Case No. MA-002-16 (May 2016): Principal Executive Manager F appealed his performance rating on his performance evaluation. ORS 240.570(4) identifies the types of personnel actions over which the Board has jurisdiction. Performance evaluations are not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

12.3.17 Other personnel actions

Harper v. Oregon Parks and Recreation Department, Case No. MA-029-12 (November 2012): Safety Specialist 2 appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that her position warranted a management service classification, and that changing the classification created “an inconsistency with other state agency positions performing the same work,” and harmed her and the work unit. ORS 240.570 “does not provide for an appeal regarding either the change in position status or the designation of one’s position as management or classified service.” The Board dismissed the appeal for lack of jurisdiction.

Nichols v. Oregon Health Authority, Oregon State Hospital, Case No. MA-030-12 (November 2012): Executive Support Specialist II appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that she could not “perform the duties of her position as a classified represented employee.” Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. Instead, she was removed due to “OHA’s determination that her position status did not warrant remaining in the management service.” The Board dismissed the appeal for lack of jurisdiction.

Brosmore v. Oregon Youth Authority, Case No. MA-027-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

True v. Oregon Youth Authority, Case No. MA-026-12 (November 2012): Executive Support Specialist appealed her nondisciplinary removal from the management service and placement in a union-represented position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant alleged that the change in her position status was inconsistent and arbitrary, and resulted in gender bias and inequality. Although the Board has jurisdiction to hear an appeal of a removal from the management service due to a reorganization or lack of work, Appellant was not removed from the management service for those reasons. The Board dismissed the appeal for lack of jurisdiction.

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012): Project Manager 3 appealed her nondisciplinary removal from the management service and placement in a union-represented Project Manager 3 position in the classified service. Appellant alleged that the Department removed her from the management service to comply with House Bill 2020, which required certain state agencies, with some exceptions, to attain a ratio of 11 nonsupervisory employees to each manager or supervisor. Appellant asked the Board “to reclassify her current represented position, restore her previous salary level and reconsider her position’s duties and expectations.” With respect to employees in the classified service, however, the Board may “only review personnel actions that affect employees who are not in a certified or recognized bargaining unit.” Because Appellant’s position was in a bargaining unit, the Board dismissed the appeal for lack of jurisdiction.

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Miller v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-10-10 (April 2011): Principal Executive Manager B appealed the Department’s refusal to allow her to rescind her resignation. The Board held, pursuant to ORS 240.570(2), that it had

no jurisdiction over the Department's refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. The Board has repeatedly ruled that it has no jurisdiction over personnel actions not listed in ORS 240.570, including reclassifications and reallocations (citing numerous cases).

Honeywell v. Department of Corrections, Case No. MA-14-10 (February 2011): Department manager appealed the Department's refusal to hire her into a Chief Investigator position after her position was eliminated. The Board held that it lacked jurisdiction over the appeal because a refusal to hire was not a personnel action listed in ORS 240.570(2). The Board also held that, for the same reason, it had no jurisdiction over alleged inconsistent hiring and promotion practices. Finally, the Board held that it had no power to grant the remedy that Appellant sought (ordering the Department to hire her) because the Board only had the power to order reinstatement or reemployment without loss of pay, citing ORS 240.560(4).

12.5 Appropriateness of personnel action

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her twelve years of prior satisfactory service precluded discipline. The Board disagreed and explained that "these factors are irrelevant" because Appellant was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to

unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious “male gay black lover” of EL, changing EL’s computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL’s car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant’s failure to take any action was “clearly unreasonable.” Appellant’s failure to act allowed an unacceptable “pattern of improper harassment to continue for a long period.” Through his conduct and his “unpersuasive explanation for his conduct,” Appellant demonstrated that he was unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. A reasonable employer could conclude that Appellant’s length of service and value as a manager did not sufficiently mitigate his conduct. The employer’s “conclusion that it was not appropriate to retain an employee who had demonstrated no ability or interest in responding to wrongdoing” was not unreasonable. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI), appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT) resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant’s extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE’s house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including “momma,” “baby,” and “hon.” The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant’s state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. Appellant

was evasive during the investigation, violated the Department's respectful workplace policy by using pet names with a subordinate, and failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of the investigation. Appellant was a long-term employee with excellent performance reviews and no prior discipline. A written reprimand was a reasonably proportionate response to Appellant's conduct. The Board dismissed the appeal.

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services Program supervisor appealed a written reprimand. The Department charged Appellant with reinstating a father's supervised visits with his child, who was in the Department's custody, without first consulting with the case notes, the Department's case database, or the caseworker assigned to the family. The father's visits were suspended shortly thereafter, then reinstated, then ultimately suspended again after he arrived at one visit under the influence of drugs and then missed consecutive visits. The Department also charged Appellant with failing to return a telephone call from a Court Appointed Special Advocate. The Department proved the first charge, regarding Appellant's reinstatement of a father's supervised visits, but failed to prove the second charge. With regard to the second charge, Appellant did not detect urgency in the oral communication of the telephone message, so she did not return the call to the Court Appointed Special Advocate because she had called others involved in the matter and believed the situation had been resolved. Appellant was hired in 2000, and promoted to the management service in 2007. The Board rejected Appellant's argument that the Department's expectations were required to be codified in a formal policy. As "a management service employee with significant responsibilities and experience, the Department could reasonably expect that Appellant would read pertinent information on the case and talk with the caseworker before making the decision that she did." The Board ordered the Department to withdraw the reprimand letter and reissue it without reference to the charge that the Department did not prove.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service, resulting in her termination from state service. Among other charges, the Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant did not tell the agency director that she had signed the lease. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions. A "higher-level manager" such as Appellant "could be expected to see, on her own initiative, if OIB's lease could be modified by way of a shorter period or a different termination clause." The Board eventually concluded, however, that an objectively reasonable employer would not have removed Appellant from the management service. Appellant's "judgment regarding the OIB lease renewal, in combination with the proven charges, warrant substantial discipline. Based on our findings, we conclude that an objectively reasonable employer would have disciplined, but not removed" Appellant, particularly given Appellant's seven years of discipline-free performance. Appellant

should have been suspended for six weeks without pay. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including a failure to maintain a respectful workplace, retaliation, engaging in inappropriate conduct as a supervisor, and violation of various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, making inappropriate comments about the executive assistant in two emails to a forestry manager, removing the executive assistant's inmate grievance processing duties without prior notice or discussion, raising concerns about a motorcycle shed, and telling a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant's grievance processing duties. The Board analyzed the appropriateness of the discipline using three factors: (1) performance expectations; (2) length of service; and (3) proportionality of the discipline and effect on the Department. Although some of the Department's expectations regarding personnel management may not have been perfectly clear, as a manager Appellant was reasonably expected to address personnel issues, and Appellant did receive clear expectations regarding his obligation to comply with policies and procedures. Appellant had two prior disciplinary actions during his management service years, which weighed against his 23-year tenure (12 of which were in the management service). Finally, Appellant's "blatant disregard" for the Department's policies supported the removal, as did his conduct in providing conflicting information during the investigation and taking actions that were perceived by employees as retaliatory and punitive. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from classified service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention,

and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report a DUII arrest. Removal and dismissal were appropriate. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Appellant's conduct also constituted misconduct because her conduct was unlawful and the result of willful, intentional actions. Appellant argued that ODOT's decision to forego discipline for the 2008 incident precluded dismissal for a repeat infraction in 2011. The Board rejected this argument. One of the primary purposes of progressive discipline is to give an employee the opportunity to correct behavior. Although ODOT did not impose formal discipline in 2008, it did afford Appellant the opportunity to correct her behavior because she was "put on notice that such conduct was not consistent with the mission of the agency or the agency's expectations of her as an employee," which she acknowledged by committing not to repeat the conduct. Removal and dismissal were appropriate. The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. In late 2011, he was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, Appellant was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death. Appellant decided that the prison should hold the inmate's body overnight until the Oregon State Police could commence its investigation the next day. There was no designated place in the institution to store corpses. Appellant directed the overnight storage of the corpse in the infirmary food cooler, which caused concern among inmates and prison employees. Appellant did not inform his superiors of his plan to store the corpse overnight in the food cooler. The Board rejected Appellant's arguments that he notified his superiors of the inmate death, as required, and that his actions did not violate any rule. Appellant's "role as the individual in charge of a prison of 3,000 inmates required more than just not violating those rules. [Appellant's] position required him to appropriately address unforeseen situations that were not explicitly provided for in prison work rules." Suspension was an appropriate level of discipline. During the events in question, Appellant was aware that his "emotional intelligence and judgment were in question," and knew or should have known what the Department expected of him. Appellant's length of service "cut[] both ways." He was a long-term employee with a good service record, but he should also have had a heightened awareness of the expectations that he call in before missing a meeting, that the prison did not store bodies and did not store them in the infirmary food cooler, and that he should have involved his superiors in the decisions about how to respond to the inmate's death. He also knew or should have known that his actions with regard

to the corpse would cause staff and inmate concern, reflect negatively on the professionalism and competence of prison staff, and undermine the efforts behind the Oregon Accountability Model. Appellant's failure to acknowledge his errors in prioritizing his activities, communicating with his superior officers, and appropriately handling the situation with the corpse "support the Department's theory that a significant level of discipline was required" to get Appellant's attention. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, "I guess a blow job is out of the question, isn't it?" Customers sitting nearby heard the remark and were offended. Appellant also made a remark to a subordinate, who had been dealing with his wife's serious illness, to the effect of, "Why don't you just shoot the bitch?" Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate, even though Appellant had no prior discipline in 11 years of state service. Other Department employees had possessed pornography on work computers, but the volume of material found on Appellant's computer was well above the average amount in other situations. Appellant's conduct was not limited to possessing pornography at work—"he also used profane, sexist, and racist language in the workplace and was abusive to his subordinate employees and outside vendors." Appellant's actions toward subordinates and vendors and his pattern of saving inappropriate material to his work computer were ongoing issues, not one-time events. Finally, Appellant did not sufficiently acknowledge his wrongdoing, which "underscores the difficulty in returning him to a position in the Department because it demonstrates a certain unwillingness to change his behavior." The Board dismissed the appeal.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor's degree. Appellant relied on a "degree" he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. To obtain the "degree," Appellant had sent documents to Rochville reflecting 15 credits he obtained in four classes and a certificate showing completion of 42 hours of instruction in limited maintenance electrician work from Chemeketa Community College. He had also sent a one-page summary of his work history and proof of attendance at several seminars. In exchange, Appellant received a diploma for a bachelor's degree and an undated "transcript"

listing 30 courses, the number of credit hours for each course, and his “grade” for each course. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a “life experience degree.” In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed “145 semester” units, and answering “yes” next to the question, “Did you graduate?” Appellant also stated that he had worked as a human resources analyst for OMD from June 2007 to the present, even though he worked for part of that time as a Maintenance and Operations Supervisor. Appellant also described his previous employment by stating that he worked only as a “Facility Maintenance Manager” for a private employer, even though he had worked as a production operator and maintenance technician for part of that employment. During the investigation, Appellant claimed that his 2012 statements in his application were the result of inattention on his part. He also contended that the degree mill was “accredited” by two online accreditation organizations. Removal was appropriate because Appellant, as a human resources manager, was aware of the expectation of candor, and knew or should have known that his lack of candor and his failure to acknowledge the wrongfulness of his actions were inconsistent with his role as a human resources manager. Appellant had an exemplary performance record, which ordinarily would weigh in favor of lesser discipline. This, however, was “an unusual situation where lesser discipline would appear to miss the mark,” in light of Appellant’s violation of the core duties and responsibilities of his job and his failure to acknowledge his wrongdoing. The Board dismissed the appeal.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at the classified employee’s house after work. The classified employee said, “I’m this close to going to Human Resources.” Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. Appellant threatened to report the classified employee’s friend, a police officer, to his supervisor, and did so. In a subsequent text message, Appellant told the classified employee that he was “immature and really not a man” and that he was “dead” to her. In subsequent communications between them, the classified employee again stated that he might go to human resources. Appellant wrote to the employee that she would “defend herself to the end” and told him to stop and move on with his life. The classified employee told Appellant that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for, in part, making threats against the classified employee, including threats about his stated intention to consult human resources. The Board concluded that removal was appropriate, reasoning that the Appellant’s “assertion that she was merely defending herself, which she believed was her right under the circumstances,

completely discounts the fact that she was a high level manager making these statements to a classified employee in relation to a work-related matter, *i.e.*, his right to file a complaint for policy violations.” Appellant was a “manager and by deciding to become sexually involved with a classified employee, she knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an obligation to notify her supervisor as soon as she became aware that such an impact existed.” The Board wrote that Appellant “never understood her role as a manager or lost her perspective regarding that role, and let her concerns about her privacy override her obligations at work.” Removal from management service was appropriate. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager’s directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV’s supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow “proper conduct” as a unit manager. Appellant’s removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant recommended the following question: “Even the best bosses generate complaints from their employees now and then. What complaints would the people you’ve managed have about you?” Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant’s last chance agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, “[Y]ou have to go! You’re off and we ain’t payin’ overtime!” Removal was an appropriate level of discipline because Appellant had been repeatedly put on notice that flippant remarks and raising her voice or arguing were not acceptable, and had specifically been warned by the last chance agreement that any further conduct of this type could result in removal. Appellant’s “failure to take responsibility for her actions makes it unlikely that a lower level of discipline would change her behavior.” The Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW

did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. Appellant argued that he was following past practice, was inadequately trained, and had no prior discipline. The Board rejected these defenses, explaining that what made Appellant's "lack of action particularly egregious is that [he] received additional compensation for performing his on-call duties." Appellant's "non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act." The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. The employer's decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer's contracting function, which Appellant had committed to help the employer regain. The Board determined that Appellant's "failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility." Appellant's actions "severely damaged the Department's ability to trust his judgment." Also, Appellant failed to understand the nature and seriousness of his conduct, and his "failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards." The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from the management service and dismissal from state service. The Board dismissed the appeal with regard to Appellant's removal from the management service, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. Appellant had a 14-year service record with no prior discipline. The evidence that Appellant personally harbored discriminatory opinions was credibly disputed by several witnesses, and there was no evidence that Appellant actually eliminated an employee from the disputed hiring process. Appellant erred by leaving an applicant

list displayed on her computer screen while an applicant was present. The Department's decision to dismiss was based not only on her statements, but "on its fear of a discrimination claim. While the concern was legitimate, and her removal from management service appropriate, Garrett's conduct was not so gross that mitigating circumstances can be ignored." The Board concluded that the Department's removal of Appellant from the management service was appropriate, but dismissal from state service violated ORS 240.555 and 240.570(5).

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board also determined that the level of discipline was objectively reasonable despite Appellant's agency work since 2003 without previous discipline—because of Appellant's preferential treatment of his personal friend, the volume of non-business related emails, the content of the emails (together reflecting a gross disregard of the agency's policies), and the similar discipline meted out in a comparable situation. The Board was also troubled by Appellant's lack of understanding of his obligations as a manager because, during the investigation, the agency gave Appellant multiple opportunities to respond to the charges, but Appellant refused, or was unable, to recognize that he did anything wrong; the Board concluded that Appellant's responses made it unlikely that his conduct would be improved by lesser progressive discipline.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on administrative leave pending an investigation of a complaint she had made against colleagues and subordinates. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but the instructions did not tell her that she was also required to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not respond to emails from management about the project's progress. The Department charged Appellant with insubordination and suspended Appellant for one week. The Board determined that Appellant engaged in "unacceptable behavior" in failing to complete the project, but that the Department failed to prove a charge of insubordination because the Department did not warn Appellant that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand.

Chapter 13 – Cause for Discipline or Removal

13.3 Alcohol-related conduct

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's

highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report a DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Appellant's conduct also constituted misconduct because her conduct was unlawful and the result of willful, intentional actions. The Board dismissed the appeal.

13.5 Complaint, failure to investigate/initiate

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. EL ultimately submitted a tort claim notice, which resulted in an investigation confirming the inappropriate behavior. The state paid EL a settlement to resolve the threatened tort claim. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant's failure to take any action was "clearly unreasonable." Appellant's failure to act allowed an unacceptable "pattern of improper harassment to continue for a long period." Through his conduct and his "unpersuasive explanation for his conduct," Appellant demonstrated that he was unable or unwilling to fully and faithfully perform

the duties of the position satisfactorily. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. The Board dismissed the appeal despite Appellant's lack of progressive discipline, concluding that after receiving verification of the child's head injuries, Appellant did not contact law enforcement or appropriate medical personnel, did not contact the child, did not travel to Portland, and did not ensure that a safety plan was in place. The Board reasoned that the potential consequences of Appellant's "non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act."

13.7 Conduct, abusive/negative/interpersonal conflicts

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department's charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded

that the Department was reasonable in removing Appellant from the management service. Moreover, Appellant engaged in misconduct. The Board rejected Appellant's contentions that her instant messages were private and that her actions were not willful. In light of Appellant's prior discipline, the Department acted reasonably in dismissing Appellant from state service. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, "I guess a blow job is out of the question, isn't it?" Customers sitting nearby heard the remark and were offended. Appellant made disparaging remarks about women and Latinos. Appellant also made a remark to a subordinate, who had been dealing with his wife's serious illness, to the effect of, "Why don't you just shoot the bitch?" Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. The same employee was riding with Appellant in his truck when he asked her to roll the window down and invite a woman stopped at a red light to join them for lunch. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate. Appellant "worked in a demanding job that included a great deal of responsibility, but the credible evidence demonstrates that he consistently used inappropriate language and treated his employees in an unacceptable manner, both of which were incompatible with his training, violated Department policies, and fell short of the expectations of a Department manager." The Board dismissed the appeal.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, Appellant threatened to report the classified employee's friend, a police officer, to his supervisor, and did so. In a subsequent text message, Appellant told the classified employee he was "immature and really not a man" and that he was "dead to me." They both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. Appellant wrote that she would

“defend herself to the end” and told him to stop and move on with his life. The classified employee told Appellant that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for Appellant’s failure to notify management of her relationship with the classified employee and of the potential conflicts of interest it created, and for making threats to the classified employee in response to his statements about going to human resources for assistance. The Board concluded that the Department proved those charges, and that removal from management service was appropriate. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager’s directive and for providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV’s supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow “proper conduct” as a unit manager. Appellant’s removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant recommended the following question: “Even the best bosses generate complaints from their employees now and then. What complaints would the people you’ve managed have about you?” Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant’s last chance agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, “[Y]ou have to go! You’re off and we ain’t payin’ overtime!” Appellant acted in an unprofessional manner and violated the expectations in the last chance agreement. The Board rejected Appellant’s argument that her conduct was “mild and unremarkable.” Appellant’s conduct was sufficiently uncooperative and abrasive to cause a manager to raise concerns about it right after the meeting, an employee to signal to Appellant to stop talking, and another employee to decide he would never volunteer to participate in another such meeting. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-007-10 (December 2010): Management service employee, the Regional Manager of Maintenance and Operations, appealed her reassignment from Region 1 (representing the Portland metro area) to Region 2 (representing the Salem metro area). Appellant was reassigned from Region 1 on the same day as another employee with whom she had experienced a protracted hostile relationship. The conflict had been so significant that it negatively affected the working operations of Region 1. Both employees had filed hostile work environment claims against the other, with Appellant filing the most recent before the reassignments. Appellant claimed that her reassignment was retaliatory due to her complaint. Determining whether an assignment, reassignment, or transfer of a management service

employee was for the “good of the service,” as provided in ORS 240.570(2), turns on whether the action was arbitrary. To determine whether the action was arbitrary, the Board examines whether the action “was supported by substantial evidence, i.e., whether there was some rational basis for the agency action,” quoting *Rau v. Department of Parks and Recreation*, Case No. MA-2-01 (January 2002). The Board determined that the Department established that the reassignment was for the good of the service because there was a rational basis for the Department’s action. The Board determined that, despite the Department’s repeated efforts to facilitate reconciliation, Appellant and the other employee had a disruptive effect on other employees, interrupting the flow of communications regarding maintenance operations.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was demoted within the management service based on Appellant’s behavior at a human resources team meeting. Appellant had previously received a letter of reprimand based on her failure to speak respectfully to her team members. The Department proved the charges on which the demotion was based. Appellant was so upset and angry at the meeting that her face was red, and she spoke critically about her team members’ work and abilities and refused to stop even when it was obvious that others present were upset. Appellant complained about what she believed was her unfair workload and angrily refused offers of help. Appellant’s behavior created a tense and negative environment. The Board determined, however, that demotion was too severe. The Department “imposed a pay reduction of indeterminate duration” on Appellant. By “moving from the mildest form of discipline (a written reprimand) to a harsh economic sanction, the Department failed to utilize corrective and progressive disciplinary measures that notified [Appellant] that further misconduct could result in the discipline ultimately imposed.” Appellant’s conduct was not so gross as to excuse the Department’s failure to use progressive discipline. The Board ordered the Department to rescind the demotion and temporarily demote Appellant for two months.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant Manager appealed a one-week disciplinary suspension. The Board determined that the Department had both proven the charges and imposed reasonable discipline proportionate to the offense. The Department charged that Appellant had violated policy and exercised poor judgment when she (1) asked an employee in another department to access and provide her with confidential information about a job applicant; (2) provided that employee with an email that disparaged two employees under her supervision by referring to them as racists; and (3) failed to address a potentially discriminatory situation with respect to those employees. The Board dismissed the appeal.

13.8 Confidential information, release of

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the appeal with regard to Appellant’s removal from management service, but granted Appellant’s challenge of her dismissal from state service on the

basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." The Board concluded that the Department's removal of Appellant from the management service was appropriate, but Appellant's dismissal from state service violated ORS 240.555 and 240.570(5).

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant's job duties involved determining applicants' eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (*see Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010)*). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Appellant had no job-related purpose for obtaining and sharing the confidential information. In addition, Appellant used his work email to send offensive emails to estranged in-laws. Appellant argued that there was an interagency agreement allowing disclosure of the confidential information and that his employer had failed to properly train him on confidentiality. Appellant also argued that the employer failed to use progressive discipline by terminating him. The Board determined that despite receiving and acknowledging repeated training on confidentiality, Appellant intentionally obtained confidential information for an employee in another department who had no proper business for obtaining the information, made extensive personal use of his work email, and knew that it was wrong to do so. The Board also determined that dismissal was proportionate to the offense because Appellant breached clear instructions and practice. The Board also determined that Appellant made contradictory claims during the investigation, the unemployment benefits hearing, and ERB hearing. As such, the Board determined that Appellant had shown that he did not appreciate the wrongfulness of his actions and therefore, progressive discipline would not help correct his behavior.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant manager in the Institutional Revenue Section of the Office of Payment Accuracy timely appealed a one-week disciplinary suspension. The Board determined that the Department had both proven the charges and imposed reasonable discipline proportionate to the offense. The Department charged that Appellant had violated policy and exercised poor judgment when she (1) asked an employee in another department to access and provide her with confidential information about a job applicant; (2) provided that employee with an email that disparaged two employees under her supervision by referring to them as racists; and (3) failed to address a potentially discriminatory situation with respect to those employees. The Board dismissed the appeal.

13.9 Conflict of interest

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. Appellant was a supervisor in the child protective services division. The Department works with many community partners in its child protective services work. Appellant's work group worked with, among others, a child advocacy center that served the region. Appellant had ongoing contact with the child advocacy center. She also represented the agency as a member of a community multi-disciplinary team, which was chaired by the director of the child advocacy center. The Department received a report of alleged child neglect, involving a claim that an intoxicated parent drove with children in the vehicle. The case involved the spouse and children of the director of the child advocacy center, with whom Appellant worked. A Department caseworker interviewed both parents (including the director of the child advocacy center), and discussed the case with Appellant, her supervisor. Appellant spoke with the director of the child advocacy center. Appellant then designated the case as "sensitive," which meant that the case could be viewed only by a small, select group of Department staff members. Appellant did not, however, bring the case to the attention of district management. Appellant assigned the case to a caseworker who was leaving the Department and had the lowest caseload, and that caseworker handled the case as any other caseworker would. The director of the child advocacy center was not given special treatment. The case was determined to be "founded" and forwarded to the review committee. Appellant's supervisor did not discuss the matter with Appellant until the investigatory interview. Among other charges, the Department charged Appellant with poor judgment when she failed to notify her program manager and district manager over the purported conflict of interest. The Department failed to prove this charge. There was no written or other express rule that defined employee obligations when faced with a case involving possible associations with community partners, and there was no proof of a universal practice of taking such cases to the program manager or the district manager. Upon discovering Appellant's conduct, the district manager did not raise the issue with Appellant, but instead reported it to human resources because the district manager knew that human resources was already investigating Appellant for other possible issues. The Board wrote that under "these circumstances, we do not conclude that the Department established that Nash exercised poor judgment in the handling of this matter."

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from classified service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. The Board held that the Department properly removed Appellant from the management service, but ordered the Department to reinstate Appellant to the classified service. As a manager, Appellant should have been alerted by the DHS

Conflict of Interest policy, even though it does not expressly require reporting of romantic relationships at work, and realized that he should have reported the relationship because it created a potential conflict of interest. Appellant also should have known that if he had questions he should have consulted with his supervisor or human resources. Moreover, Appellant's failure to disclose his relationship eroded his effectiveness as a manager with his other subordinates and compromised his ability to enforce the Department's policies. Removal was consistent with ORS 240.570(3).

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. He also stated that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for Appellant's failure to notify management of her relationship with the classified employee and of the potential conflicts of interest it created, and for making threats to the classified employee in response to his statements about going to human resources for assistance. Appellant "failed to exercise good judgment as a manager by failing to alert her supervisor to the conflicts that had developed, which raised possible policy violations and potential liability for the Department and by threatening [the classified employee] regarding his intent to file a complaint." Removal from management service was appropriate. The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed a three-week suspension without pay. The Board found that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. As hiring manager, Appellant did not fully disclose the extent of his friendship with an applicant. Appellant did not tell other managers that he and the applicant communicated on a daily basis about the intimate details of their lives, provided essential support for each other in their work and personal lives, and saw each other frequently after work and on weekends. Appellant's relationship with the applicant prevented him from treating her like any other applicant. Until Appellant's managers viewed Appellant and the applicant's email communications, the managers had no reason to know that Appellant's friendship with the applicant was causing him to behave in the manner he did. Even if Appellant had not shared inappropriate information about the hiring process with the applicant, the Board

would still have found a violation because the manner in which Appellant conveyed the information showed preferential treatment. It was Appellant's treatment of her as a confidant during the process that allowed the applicant to feel that it was acceptable to ask him to review her test question responses and application, and even to send him proposed interview questions. It is not credible that Appellant would have communicated with any other applicants in such a familiar and preferential manner. Appellant also failed to demonstrate good judgment as a hiring manager. His email communications with the applicant reflected that they had the type of close relationship that would make it very difficult for him to remain impartial. Although his managers did not tell Appellant that being friends with the applicant was a problem, Appellant, unlike his managers, knew the closeness of the relationship he had with the applicant. Appellant should have known that his continued involvement in the hiring process in which his friend was an applicant, and the continued personal communications, would either affect his ability to be impartial or at least give the appearance that he was not impartial. A good manager would have recognized these difficulties and withdrawn from participation in the hiring process. Appellant demonstrated bad judgment as a hiring manager by failing to recognize or take action to ensure that the hiring process was unbiased and appeared unbiased. The Board dismissed the appeal.

13.12a Electronic and communications systems (email, messaging, cell phones, personal computers, networks), misuse of

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including by putting images on EL's state-owned computer and by sending inappropriate emails. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service and the classified service, despite his length of service and no prior discipline. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. This "level of fecklessness, without a credible or meaningful explanation, was a willful dereliction of his duties and constituted willful, intentional actions[.]" The Board dismissed the appeal.

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public

hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. The Board wrote that it was "unmoved by the possibility that Appellant's messages were not shared with others, that Appellant did not intend for his words to be derogatory or insulting, or that JE never complained about sexual harassment." The Board dismissed the appeal.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department's charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded that the Department was reasonable in removing Appellant from the management service and the classified service. The Board rejected Appellant's contentions that her instant messages were private and that her actions were not willful. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal

from the management service. The Department removed Appellant based on approximately eight charges, including failing to maintain a respectful workplace, retaliating, engaging in inappropriate conduct as a supervisor, and violating various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, made inappropriate comments about the executive assistant in two emails to a forestry manager, removed the executive assistant's inmate grievance processing duties without prior notice or discussion, raised concerns about a motorcycle shed, and told a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant's grievance processing duties. Appellant made a variety of inappropriate comments to or about a subordinate, including putting a handwritten note on her desk, stating, "Your office is a mess and a fire hazard. Please clean this place up." Appellant also referred to the subordinate, in an email to another manager, as "out of control" and having gone home in tears. Appellant failed to understand that his statements and conduct with regard to his subordinate "appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager." Although the Board considered Appellant's length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Appellant established that no Department employees had been dismissed for having pornography on their work computers. Although the Department may not have previously dismissed an employee for possessing pornography on a work computer, "the volume of material contained in [Appellant's] files was well above the average amount found in prior situations." Further, the Department "proved that each case is examined independently based on the nature of the material, the volume of the images found, consideration of aggravating and mitigating factors, and the position held by the employee." Removal from management service and dismissal from state service were appropriate. Appellant "worked in a demanding job that included a great deal of responsibility, but the credible evidence demonstrate[d]" that he violated Department policies and fell short of the expectations of a Department manager. The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board held that Appellant failed to use good judgment and violated the agency's Maintaining Professional Workplace policy by referring to his supervisor disrespectfully in emails to a friend who was also

a state employee and encouraging her to do the same. In particular, the Appellant emailed the friend that his manager had given him “a blank reaction, kind of like a deer in the headlights.” When the friend responded, “This guy is not the brightest bulb is he? Kinda hard to communicate with someone who can’t think on their feet. It’s like pulling teeth. No wonder things move so slow,” Appellant’s only response was, “That’s when things move at all.” The Board dismissed the appeal. The Board also held that Appellant violated agency Acceptable Use of Information Systems and Personal Use of State Resources policies by exchanging hundreds of personal emails during work time over a six-month period using the agency’s information system.

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other unfitness. Appellant’s job duties involved determining applicants’ eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (*see Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010)*). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. Appellant had no job-related purpose for obtaining and sharing the confidential information. In addition, Appellant used his work email to send offensive emails to estranged in-laws. Appellant argued that there was an interagency agreement allowing disclosure of the confidential information and that his employer had failed to properly train him on confidentiality. Appellant also argued that the employer failed to use progressive discipline by terminating him. The Board determined that despite receiving and acknowledging repeated training on confidentiality, Appellant intentionally obtained confidential information for an employee in another department who had no proper business for obtaining the information, made extensive personal use of his work email, and knew that it was wrong to do so. The Board also determined that dismissal was proportionate to the offense because Appellant breached clear instructions and practice. The Board dismissed the appeal.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant manager appealed a one-week disciplinary suspension. The Board determined that the Department had both proven the charges and imposed reasonable discipline proportionate to the offense. The Department charged that Appellant had violated policy and exercised poor judgment when she (1) asked an employee in another department to access and provide her with confidential information about a job applicant; (2) provided that employee with an email that disparaged two employees under her supervision by referring to them as racists; and (3) failed to address a potentially discriminatory situation with respect to those employees. The Board dismissed the appeal.

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009): A management service employee appealed his reprimand for writing an email that was derogatory toward colleagues, supervisors, the union, and the Department as a whole. The

employee printed the email, which became intermixed with other documents and was discovered by a targeted colleague who brought the email to management's attention. The Department disciplined Appellant by issuing a letter of reprimand. Appellant argued that a reprimand was excessive. The Board held that the Department was objectively reasonable and the reprimand was proportionate. The Board concluded that Appellant had received clear notice regarding the Department's expectations of professional conduct in the workplace and that Appellant had admitted that his conduct was unprofessional. Further, the Board concluded that a written reprimand was reasonable and proportionate to the Appellant's misconduct.

13.13 Ethics issues

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract. Although Appellant made unauthorized contract amendments, the Department failed to prove that Appellant caused the misuse of taxpayer funds, and the Department's Code of Conduct policy related to "Misuse of Official Department Position" did not apply because there was no allegation that Appellant or any other employee used the employer for personal or financial gain, political purpose, obtaining privileges, or avoiding the consequences of an illegal act. The Board dismissed the appeal on other grounds.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from the management service and dismissal from state service. The Board dismissed the appeal with regard to Appellant's removal from the management service, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." The Board determined that it would be difficult for any manager in Appellant's position to resume her position as the standard for maintaining and teaching the Department's Core Values and non-discrimination policies in light of the resulting erosion of her moral authority and effectiveness. An important consideration in the Board's review of a removal from management service is the extent to which the employer's trust and confidence in the employee has been harmed and, therefore, the extent to which the employee's capacity to act as a manager has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011):

Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. Among other actions, while acting as a hiring manager, Appellant failed to disclose to other managers his personal relationship with an applicant, inappropriately provided the applicant with information about the hiring decision and other applicants that was not shared with others, and assisted the applicant in filling out application materials.

13.14 Hiring procedure, violation of

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011):

Principal Executive Manager C appealed her removal from the management service and dismissal from state service. The Board dismissed the appeal in part, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." An important consideration in the Board's review of a removal from management service is the extent to which the employer's trust and confidence in the employee has been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011):

Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board found that Appellant gave preferential treatment to an agency job candidate who was also a personal friend, failed to demonstrate good judgment as a hiring manager in email communications with that applicant, and failed to disclose the full nature of the personal relationship to other managers involved in the hiring process. Appellant's email communications with the applicant reflected that they had the type of close relationship that would make it very difficult for Appellant to remain impartial. Although his managers did not tell Appellant that being friends with the applicant was a problem, Appellant, unlike his managers, knew the closeness of the relationship he had with the applicant. Appellant should have known that his continued involvement in the hiring process in which his personal friend was an applicant, and the continued personal communications, would either affect his ability to be impartial or would at least give the appearance that he was not impartial. A good manager would have recognized these difficulties and withdrawn from participation in the hiring process. Appellant demonstrated bad judgment as a hiring manager by

failing to recognize or take action to ensure that the hiring process was unbiased and appeared unbiased.

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010): Assistant manager appealed one-week disciplinary suspension. The Board determined that the Department had both proven the charges and imposed reasonable discipline proportionate to the offense. The Department had charged that Appellant had violated policy and exercised poor judgment when she (1) asked an employee in another department to access and provide her with confidential information about a job applicant; (2) provided that employee with an email that disparaged two employees under her supervision by referring to them as racists; and (3) failed to address a potentially discriminatory situation with respect to those employees. The Board dismissed the appeal.

13.15 Information, withholding of

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) then began an investigation. Appellant denied engaging in sexual activity with JE at work, and said that he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. Appellant's failure "to disclose his true relationship at the outset of the investigation was at best incomplete and misleading, and at worst, false." Appellant also routinely minimized and mischaracterized his communications with JE and failed to provide a meaningful timeline as directed. This conduct violated the Department's code of ethics. The Board dismissed the appeal.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service, resulting in her termination from state service. Among other charges, the Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant’s knowledge of OIB’s ongoing financial and regulatory problems. Appellant did not tell the agency director that she had signed the lease. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director’s predecessor. The Board concluded that there was some merit to both parties’ positions. A “higher-level manager” such as Appellant “could be expected to see, on her own initiative, if OIB’s lease could be modified by way of a shorter period or a different termination clause.” The Board concluded, however, that an objectively reasonable employer would not have removed Appellant from the management service. Appellant’s “judgment regarding the OIB lease renewal, in combination with the proven charges, warrant substantial discipline. Based on our findings, we conclude that an objectively reasonable employer would have disciplined, but not removed” Appellant, particularly given Appellant’s seven years of discipline-free performance. Although Appellant “would have been better served to inform the new agency director of the OIB lease, her failure to do so is not the type of egregious behavior where we have held removal to be the appropriate sanction.” Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from the management service and dismissal from state service. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver’s license was suspended for 90 days following her entry into a diversion program. In April 2011, while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Ultimately, Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver’s license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Appellant’s repeated DUII arrests were contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Further, Appellant knew or should have known that prompt disclosure of her arrest was expected, especially given her 2008 incident. Appellant’s lack of candor reflected poor judgment, which “provides an additional factor weighing in favor of ODOT’s decision to dismiss her from state service.” The Board dismissed the appeal.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. Appellant began a consensual romantic relationship with a direct subordinate. Appellant did not report the relationship to his supervisor, although he revealed it to several coworkers. Appellant and his romantic partner did not behave inappropriately at work and there was no evidence that Appellant made any decisions or took any actions influenced by the relationship. When questioned in an investigatory interview, Appellant admitted the existence of the relationship, admitted that he had not told his supervisor, and said that his romantic partner was applying for other jobs. Appellant stated that he was unclear about when he should have disclosed the relationship to his supervisor. The Department properly removed Appellant from the management service. In addition, Appellant committed misconduct within the meaning of ORS 240.555 by intentionally failing to disclose a known potential conflict of interest (*i.e.*, his relationship with a subordinate). Appellant “failed to protect himself, [the subordinate], and DHS from potential consequences arising from his personal relationship” with the subordinate. Removal from the management service was consistent with ORS 240.570(3), but the Board ordered the Department to reinstate Appellant to classified service in light of his length of state service and lack of previous discipline.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, “I’m this close to going to Human Resources.” Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. He also stated that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the panel, and did not report the events or remove herself from the panel. The Department removed Appellant from management service for, in part, failing to notify a manager about her off-duty conflicts and the threatened harassment claim. By deciding to become sexually involved with a classified employee, Appellant “knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an obligation to notify her supervisor as soon as she became aware that such an impact existed.” Appellant had an obligation “to be proactive as a manager” and report the possible harassment complainant’s concerns to a manager. Removal from the management service was appropriate. The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board

dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. Although Appellant disclosed his friendship with a job applicant, he did not disclose the closeness of the relationship or that he was assisting her in the application process. Appellant did not tell other managers that he and the job applicant communicated on a daily basis about the intimate details of their lives, provided essential support for each other in their work and personal lives, and saw each other frequently after work and on weekends. The real issue was not that Appellant had a personal relationship with the applicant. The issue was, as the email communications showed, that Appellant was not completely forthcoming and that Appellant's relationship with the applicant prevented him from treating her like any other applicant. Until his managers viewed Appellant's and the applicant's email communications, they had no reason to know that Appellant's friendship with the applicant was causing him to behave in the manner that he did.

13.16 Insubordination (see also 3.12)

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. Appellant repeatedly sent instant messages that violated the Department's "professional-workplace" policy. Although the Board concluded that such actions constituted misconduct, the Board also concluded that those actions did not amount to "insubordination." In doing so, the Board distinguished violating a workplace policy (misconduct) from an immediate and staunch refusal to obey a superior's direct order (insubordination).

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): Management service employee, a human resources manager, was placed on administrative leave pending an investigation of a complaint she had made against colleagues and subordinates. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but the instructions did not specifically tell her that she was also required to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not respond to emails from management about the project's progress. The Department charged Appellant with insubordination and suspended Appellant for one week. An employee who refuses to obey an order of a supervisor is guilty of insubordination if (1) the refusal was knowing, willful, and deliberate—not merely negligent, (2) the order was explicit and clearly given, (3) the order was both reasonable and related to work, (4) the person giving the order had appropriate authority and the employee understood that, (5) the employee was aware of the consequences of failing to obey the order, and (6) when practicable, the employer gave the employee time to correct the potentially insubordinate behavior. The Board determined that Appellant engaged in "unacceptable behavior" in failing to complete the project, but that the Department failed to prove a charge of insubordination because the Department did not warn Appellant that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand.

13.17 Investigation, failure to cooperate/dishonesty in

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) then began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he did have a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. Appellant was evasive during the investigation and failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of the investigation. Appellant's failure "to disclose his true relationship at the outset of the investigation was at best incomplete and misleading, and at worst, false." Appellant also routinely minimized and mischaracterized his communications with JE and failed to provide a meaningful timeline, as directed. This conduct violated the Department's code of ethics. Appellant also disregarded the HR directive to keep the details of the investigation confidential. The Board dismissed the appeal.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including a failure to maintain a respectful workplace, retaliation, engaging in inappropriate conduct as a supervisor, and violation of various policies and procedures. The Department also proved that Appellant gave evasive and conflicting information during the investigative process. Specifically, Appellant asserted that he had discussed (and received approval from) a superior regarding the decision to reassign certain duties of an employee. The Board,

however, concluded that the record established that such discussions had not taken place. In reaching that conclusion, the Board stated that corroborated testimony from others directly conflicted with Appellant's assertions, as did contemporaneous emails. The Board ultimately dismissed the appeal. Although the Board considered Appellant's length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant's actions on the Department.

13.18 Language, inappropriate

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. When investigated, Appellant acknowledged that he had a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. Appellant conceded that his use of pet names was inappropriate. The Department reasonably expected its employees to maintain appropriate boundaries with coworkers. The Board wrote that it was "unmoved by the possibility that Appellant's messages were not shared with others, that Appellant did not intend for his words to be derogatory or insulting, or that JE never complained about sexual harassment." The Board dismissed the appeal.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged, among other things, that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; and (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others. The Board concluded that the Department was reasonable in removing Appellant from the management service and dismissing her from state service. The Board concluded that Appellant's actions constituted misconduct. In doing so, it rejected Appellant's contentions that her instant messages were private and that her actions were not willful. In light of Appellant's prior discipline, the Department acted reasonably in dismissing Appellant from state service. The Board dismissed the appeal. One Board Member concurred in part and dissented in

part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. Appellant made a variety of inappropriate comments to or about a subordinate, including putting a handwritten note on her desk, stating, “Your office is a mess and a fire hazard. Please clean this place up.” Appellant also referred to the subordinate, in an email to another manager, as “out of control” and having gone home in tears. Appellant failed to understand that his statements and conduct with regard to his subordinate “appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager.” Although the Board considered Appellant’s length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant’s actions on the Department. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff’d without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, “I guess a blow job is out of the question, isn’t it?” Customers sitting nearby heard the remark and were offended. Appellant made disparaging remarks about women and Latinos. Appellant also made a remark to a subordinate, who had been dealing with his wife’s serious illness, to the effect of, “Why don’t you just shoot the bitch?” Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. A female employee was riding with Appellant in his truck when he asked her to roll the window down and invite a woman stopped at a red light to join them for lunch. Appellant also used his work computer to view and store substantial personal material, including some pornographic images. Removal from management service and dismissal from state service were appropriate. Appellant “worked in a demanding job that included a great deal of responsibility, but the credible evidence demonstrate[d] that he consistently used inappropriate language and treated his employees in an unacceptable manner, both of which were incompatible with his training, violated Department policies, and fell short of the expectations of a Department manager.” The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state resources, maintaining a professional workplace, and conflicts of interest. The Board held that Appellant failed to use good judgment and violated the agency’s Maintaining Professional Workplace policy by referring to his supervisor disrespectfully in emails to a friend who was also a state employee and encouraging her to do the same. In particular, the Appellant emailed the

friend that his manager had given him “a blank reaction, kind of like a deer in the headlights.” When the friend responded, “This guy is not the brightest bulb is he? Kinda hard to communicate with someone who can’t think on their feet. It’s like pulling teeth. No wonder things move so slow,” Appellant’s only response was, “That’s when things move at all.”

13.20 Misrepresentation

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant’s extramarital relationship. Appellant denied the relationship and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) then began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he had a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE’s house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including “momma,” “baby,” and “hon.” The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant’s state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. The Board dismissed the appeal.

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service. Hired in June 2007 as a Maintenance and Operations Supervisor, Appellant was recruited in 2008 for a Human Resources Analyst 3 position. The position required a bachelor’s degree. Appellant relied on a “degree” he obtained in 2003 from a mail-order degree mill, Rochville University, which offered a requested degree for a one-time payment. To obtain the “degree,” Appellant had sent documents to Rochville reflecting 15 credits he obtained in four classes and a certificate showing completion of 42 hours of instruction in limited maintenance electrician work from Chemeketa Community College. He had also sent a one-page summary of his work history and proof of attendance at several seminars. In exchange, Appellant received a diploma for a bachelor’s degree and an undated “transcript”

listing 30 courses, the number of credit hours for each course, and his “grade” for each course. When interviewed in 2008 for the Human Resources Analyst 3 position, Appellant described his degree as a “life experience degree.” In 2012, Appellant applied for a Human Resources Analyst 3 position at another agency. This time, Appellant described his college education by listing dates of attendance, writing that he had completed “145 semester” units, and answering “yes” next to the question, “Did you graduate?” Appellant also stated that he had worked as a human resources analyst for OMD from June 2007 to the present, even though he had worked for some of that time as a Maintenance and Operations Supervisor. Appellant also described his previous employment by stating that he worked only as a “Facility Maintenance Manager” for a private employer, even though he had worked as a production operator and maintenance technician for part of that employment. During the investigation, Appellant claimed that his 2012 statements in his application were the result of inattention on his part. He also contended that the degree mill was “accredited” by two online accreditation organizations. Removal was appropriate because Appellant, as a human resources manager, was aware of the expectation of candor, and knew or should have known that his lack of candor and his failure to acknowledge the wrongfulness of his actions were inconsistent with his role as a human resources manager. Appellant’s 2012 application “plainly misrepresented his work experience” because he “misrepresented his years of work as a Department [Human Resources Analyst 3] and his years of work as a Facility Maintenance Manager.”

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. The Board determined that removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board dismissed the appeal.

13.21 Off-duty conduct

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT’s highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 (before she was promoted to the management service) and again in 2008, when her driver’s license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In April 2011, while off duty, Appellant was

arrested and charged again with DUII. Appellant did not disclose the arrest for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. The employer may require employees to refrain from off-duty conduct that would damage the employer's business, reputation, or the employee's effectiveness. The Board will weigh the employee's competing interest to be free of employer intrusion into off-duty activities against these employer interests. The Board weighed Appellant's interests against the fact that ODOT's mission involves providing a safe, efficient transportation system. Appellant's conduct "strikes at the core of the agency's mission, values, and goals," and was also the subject of a media report that reflected negatively on ODOT's reputation. In addition, Appellant's conduct and its public exposure would likely have damaged her effectiveness as a manager. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, Appellant's failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Considering its mission, and the close nexus between off-duty DUII violations and the agency's mission, ODOT was not unreasonable or arbitrary in expecting its "management service employees to refrain from driving under the influence of intoxicants, even while off duty." The Board emphasized that it also gives weight to the extent to which management service employees' actions do or do not reflect the proper use of judgment and discretion. The Board dismissed the appeal.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, "I'm this close to going to Human Resources." Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. He also stated that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for, in part, making threats against the classified employee, including threats about his stated intention to consult human resources. By deciding to become sexually involved with a classified employee, Appellant "knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an

obligation to notify her supervisor as soon as she became aware that such an impact existed.” Appellant knew that she “was held to a higher standard as a manager and expected to be proactive in ensuring the integrity of the work environment; and knew that conduct occurring outside of work, such as her relationship with [the coworker], which had a negative impact on the working environment and working relationships,” violated the Department’s policies against sexual harassment and inappropriate workplace behavior. The Board dismissed the appeal.

13.23 Property, misappropriation of

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department’s policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department’s charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded that the Department was reasonable in removing Appellant from the management service and the classified service. The Board rejected Appellant’s contentions that her instant messages were private and that her actions were not willful. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff’d without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. An investigation of Appellant’s computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate. Appellant “worked in a demanding job that included a great deal of responsibility, but the credible evidence demonstrate[d]” that he violated Department policies and fell short of the expectations of a Department manager. The Board dismissed the appeal.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): Principal Executive Manager D appealed his three-week suspension without pay. The Board dismissed, finding that Appellant had violated four agency policies regarding use of state

resources, maintaining a professional workplace, and conflicts of interest. The Board held that Appellant violated agency Acceptable Use of Information Systems and Personal Use of State Resources policies by exchanging hundreds of personal emails during work time over a six-month period using the agency's information system.

13.27 Sex-related conduct

Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015): Correctional lieutenant at Snake River Correctional Institution (SRCI) appealed a written reprimand and removal from the Tactical Emergency Response Team (TERT), resulting in loss of a four percent pay differential. Appellant was having a secret extramarital affair with JE, the ex-wife of one of his indirect reports. A captain at SRCI told Appellant that he heard a rumor about Appellant's extramarital relationship. Appellant denied the relationship, and then went to his direct superior and expressly stated that the rumor was untrue. The Department then received a public hotline complaint from a former correctional officer who alleged, among other things, that Appellant was having sex with JE at work during the graveyard shift. Human Resources (HR) then began an investigation. Appellant denied engaging in sexual activity with JE at work, and said he used his state-issued cell phone to talk to and text with JE on only work-related topics. The interviewer directed Appellant to keep the interview confidential. After the interview, Appellant disclosed to his superiors at SRCI that he had a personal relationship with JE, had used his state cell phone for personal use, and had exchanged only two or three emails with JE. The Assistant Superintendent of Security directed Appellant to submit a timeline and details about his relationship with JE, including how often they saw each other. Appellant disclosed only the start and end dates of his relationship with JE, and did not provide the other details requested. Appellant then went to JE's house and told her about the investigation, and told her not to lie or cover up their relationship. HR investigators thereafter discovered that Appellant and JE had exchanged over 100 emails and 100 instant messages, including personal conversations and flirtatious banter in which Appellant called JE pet names, including "momma," "baby," and "hon." The investigation also revealed that Appellant and JE had exchanged a large number of text messages via Appellant's state cell phone, although the investigators were unable to obtain the text of the messages themselves. The written reprimand and removal from TERT were appropriate. The use of pet names "is unprofessional and particularly troubling when used by a superior to a subordinate." The Department reasonably expected its employees to maintain appropriate boundaries with coworkers. The Board wrote that it was "unmoved by the possibility that Appellant's messages were not shared with others, that Appellant did not intend for his words to be derogatory or insulting, or that JE never complained about sexual harassment." The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees,

Appellant made a remark about a waitress at a restaurant to the effect of, “I guess a blow job is out of the question, isn’t it?” Customers sitting nearby heard the remark and were offended. An investigation of Appellant’s computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate, even though Appellant had no prior discipline in 11 years of state service. Other Department employees had possessed pornography on work computers, but the volume of material found on Appellant’s computer was well above the average amount in other situations. Appellant’s conduct was not limited to possessing pornography at work. He “also used profane, sexist, and racist language in the workplace and was abusive to his subordinate employees and outside vendors.” Appellant’s actions toward subordinates and vendors and his pattern of saving inappropriate material to his work computer were ongoing issues, not one-time events. Finally, Appellant did not sufficiently acknowledge his wrongdoing, which “underscores the difficulty in returning him to a position in the Department because it demonstrates a certain unwillingness to change his behavior.” The Board dismissed the appeal.

Buehler v. Employment Department, Case No. MA-17-12 (March 2013): Principal Executive Manager C, Acting Assistant Manager at the Metro Unemployment Insurance Center (MUIC), appealed her removal from management service and return to the classified service. Appellant had an on-again off-again consensual romantic relationship with a classified employee at the MUIC who did not report to her. At one point, after a break-up of the relationship, Appellant showed up at his house after work. The classified employee said, “I’m this close to going to Human Resources.” Later, Appellant and the employee resumed their relationship. In another off-duty conflict between them, they both stated that they were ending the relationship. In subsequent communications between them, the classified employee again stated that he might go to human resources. He also stated that his ex-girlfriend, whom he dated during one of the gaps in his relationship with Appellant and who also worked in the MUIC, believed Appellant was harassing her. Appellant later sat on a hiring panel where the ex-girlfriend was an applicant. Appellant failed to recognize that it was not appropriate for her to sit on the hiring panel, and did not report the events or remove herself from the hiring panel. The Department removed Appellant from management service for, in part, making threats against the classified employee, including threats about his stated intention to consult human resources. By deciding to become sexually involved with a classified employee, Appellant “knew or should have known that her actions could lead to behavior that would affect the workplace and possibly result in liability for the Department. As such, she was responsible for ensuring that this did not happen and, at a minimum, had an obligation to notify her supervisor as soon as she became aware that such an impact existed.” Appellant knew she “was held to a higher standard as a manager and expected to be proactive in ensuring the integrity of the work environment; and knew that conduct occurring outside of work, such as her relationship with [the coworker], which had a negative impact on the working environment and working relationships,” violated the Department’s policies against sexual harassment and inappropriate workplace behavior. The Board dismissed the appeal.

13.28 Sick leave, abuse of

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board dismissed the appeal.

13.32 Vehicle-related conduct

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including smoking in state vehicles and using ATVs without the appropriate certification. The Board rejected Appellant's argument that his violations of certain policies and procedures (related to smoking in vehicles and use of ATVs) were minor. Appellant's actions showed a "blatant disregard" for Department policies, which, as a manager, he was expected to enforce. Appellant failed to understand that "his policy and procedure violations hurt his ability to serve as a manager." Although the Board considered Appellant's length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant's actions on the Department. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In April 2011 while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Ultimately, Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. The employer may require employees to refrain from off-duty conduct that would damage the employer's business,

reputation, or the employee's effectiveness, and the Board will weigh the employee's competing interest to be free of employer intrusion into off duty activities with these employer interests. The Board weighed Appellant's interests with the fact that ODOT's mission involves providing a safe, efficient transportation system. Appellant's conduct "strikes at the core of the agency's mission, values, and goals," and was also the subject of a media report that reflected negatively on ODOT's reputation. In addition, Appellant's conduct and its public exposure would likely have damaged her effectiveness as a manager. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Considering its mission, and the close nexus between off-duty DUII violations and the agency's mission, ODOT was not unreasonable or arbitrary in expecting its "management service employees to refrain from driving under the influence of intoxicants, even while off duty." The Board emphasized that it also gives weight to the extent to which management service employees' actions do or do not reflect the proper use of judgment and discretion. The Board dismissed the appeal.

13.34 Work performance, loss of confidence in

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service. The Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions, but that an objectively reasonable employer would not have removed Appellant from the management service for her actions regarding the lease, given Appellant's positive employment history. To varying degrees, the Commission proved some of the remaining charges, including charges that Appellant (1) did not make available the procedures to be followed in the event that the security alarm was triggered, (2) failed to have employees who were issued cell phones after 2011 sign user agreements, (3) was negligent in not providing meaningful feedback regarding an organizational chart sent to her for review by a Department of Administrative Services employee, and (4) failed to hold and document quarterly safety committee meetings. The Commission failed to prove charges that Appellant (1) failed to implement procedures for a panic alarm, (2) failed to properly catalog a personal service contract by logging and storing it with an Executive Secretary's personal service contracts, (3) failed to take the initiative to plan a meaningful Administrative Services Team meeting in August 2013, (4) failed to effectively administer human resources for OIB, (5) failed to ensure that OIB had an appropriate subminimum wage certificate in effect from 2011 to 2013, (6) failed to accurately prepare OIB budget and fiscal information, and (7) engaged in inappropriate work activity while on

administrative leave. Appellant's removal violated ORS 240.570(3). Appellant had been employed for approximately seven years without any disciplinary action. Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the Commission's agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including a failure to maintain a respectful workplace, retaliation, engaging in inappropriate conduct as a supervisor, and violation of various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, making inappropriate comments about the executive assistant in two emails to a forestry manager, removing the executive assistant's inmate grievance processing duties without prior notice or discussion, raising concerns about a motorcycle shed, and telling a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant's grievance processing duties. The Board rejected Appellant's argument that his violations of certain policies and procedures (related to smoking in vehicles and use of ATVs) were minor. Appellant's actions showed a "blatant disregard" for Department policies, which, as a manager, he is expected to enforce. Appellant failed to understand that his statements and conduct with regard to his subordinate "appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager." Although the Board considered Appellant's length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant's actions on the Department. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT's highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver's license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011 while off duty, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home

detention, and received a lifetime driver's license suspension. ODOT has no written policy requiring employees to report an off-duty DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Appellant's conduct also constituted misconduct because her conduct was unlawful and the result of willful, intentional actions. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, "I guess a blow job is out of the question, isn't it?" Customers sitting nearby heard the remark and were offended. Appellant also made a remark to a subordinate, who had been dealing with his wife's serious illness, to the effect of, "Why don't you just shoot the bitch?" Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate, even though Appellant had no prior discipline in 11 years of state service. The Department properly determined that Appellant "was not capable of performing his managerial duties, and that his 'unfitness to render effective service' was evident from his conduct." Moreover, the Department properly determined that the totality of Appellant's conduct "amounted to misconduct that undermined the Department's belief that he could faithfully perform the duties of his job" and "would not likely be improved with progressive measures," and, therefore, dismissal from state service was also appropriate. The Board dismissed the appeal.

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012): Facilities Services Administrator appealed his removal from the management service. The employer proved that Appellant made unauthorized amendments to a contract for electrical work at the Oregon State Penitentiary. The consultant was then placed at significant risk by proceeding with work valued at over \$400,000 without appropriate authorization. In addition, without involving the contracts unit, Appellant created an invalid amendment to cover consulting engineers' work on a Two Rivers Correctional Institution project. The Department of Justice ultimately determined that the amendment was legally unenforceable because it was outside the scope of services of the contract.

The total value of the work outside the scope was almost half a million dollars. Appellant's actions caused a delay in payments to the consultant and resulted in additional work and expense to the employer. The employer's decision to remove Appellant from his position was reasonable under the circumstances because the employer was attempting to improve the credibility of the employer's contracting function, which Appellant had committed to help the employer regain. Appellant's "failure to have legally enforceable amendments in place for the work that he authorized had a clear potential to impact that credibility." Also, Appellant's actions "severely damaged the Department's ability to trust his judgment." Appellant failed to understand the nature and seriousness of his conduct or the fact that his "failure to follow the appropriate contract processes significantly hurt his ability to hold the employees he supervised to those same standards." The Board dismissed the appeal.

Garrett v. Department of Human Services, Case No. MA-01-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the appeal in part, but granted Appellant's challenge of her dismissal from state service, which was based on misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees. Appellant engaged in a series of missteps that, "for someone with her level of managerial experience and training, clearly showed an inability to draw boundaries with subordinates, appreciate the seriousness of sensitive information entrusted to her as a manager, or treat her employees in accordance with Departmental policies." The Board determined that it would be difficult for any manager in Appellant's position to resume her position as the standard for maintaining and teaching the Department's Core Values and non-discrimination policies given the resulting erosion of her moral authority and effectiveness. An important consideration in the Board's review of a removal from management service is the extent to which the employer's trust and confidence in the employee has been harmed and, therefore, the extent to which the employee's capacity to act as a member of the management team has been compromised, citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984). The Board dismissed the appeal with regard to Appellant's removal from management service.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. Removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and (4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. With regard to the removal from management service, the Board wrote that Appellant's "lack of candor about

his conduct irrevocably and significantly damaged the Department's ability to trust him." The Board dismissed the appeal.

13.35 Work performance, unsatisfactory

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. Between May and October 2013, EL specifically told Appellant that he wanted the conduct to stop. Although Appellant was privately supportive of EL, who was his personal friend, Appellant took no action to report the harassment, or to involve human resources or upper management. The employer properly removed Appellant from the management service. Appellant acknowledged that he had done nothing about the harassment, and offered no explanation other than to state that he did not know what to do. Appellant's failure to take any action was "clearly unreasonable." Appellant's failure to act allowed an unacceptable "pattern of improper harassment to continue for a long period." Through his conduct and his "unpersuasive explanation for his conduct," Appellant demonstrated that he was unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. Appellant was also properly dismissed from the classified service. The Board dismissed the appeal.

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015): Child Protective Services Program supervisor appealed a written reprimand. The Department charged Appellant with reinstating a father's supervised visits with his child, who was in the Department's custody, without first consulting with the case notes, the Department's case database, or the caseworker assigned to the family. The father's visits were suspended shortly thereafter, then reinstated, then ultimately suspended again after he arrived at one visit under the influence of drugs and then missed consecutive visits. The Department also charged Appellant with failing to return a telephone call from a Court Appointed Special Advocate. The Department proved the first charge, regarding Appellant's reinstatement of a father's supervised visits, but failed to prove the second charge. With regard to the second charge, Appellant did not detect urgency in the oral communication of the telephone message, so she did not return the call to the Court Appointed Special Advocate because she had called others involved in the matter and believed the situation had been resolved. The Board rejected Appellant's argument that the Department's expectations were required to be codified in a formal policy. As "a management service employee with significant responsibilities and experience, the Department could reasonably expect that Appellant would read pertinent information on the case and talk with the caseworker before making the decision that she did." The Board ordered the Department to

withdraw the reprimand letter and reissue it without reference to the charge that the Department did not prove.

Nash v. Department of Human Services, Case No. MA-008-14 (December 2014): Principal Executive Manager C appealed her removal from the management service and dismissal from the classified service. The Department charged that Appellant (1) sent electronic communications that were disrespectful, derogatory, and demeaning about managers and represented staff; (2) engaged in unacceptable use of information-related technology by using profanity and demeaning managers and staff; (3) sent instant messages that contained profanities and demeaning remarks against managers and represented staff, and further exercised poor judgment when she failed to report other managers and represented staff for violating the Department's policies when they communicated with her in an unprofessional and disrespectful manner about others; and (4) violated the public trust based on her conduct contained within the other charges. The Department established that Appellant had committed some but not all of the actions charged. The Department did not prove that Appellant exercised poor judgment in her handling of a purported conflict of interest. The Department's charge that Appellant had violated the public trust was merely derivative and did not need to be considered. The Board concluded that the Department was reasonable in removing Appellant from management service. Moreover, Appellant engaged in misconduct. The Board rejected Appellant's contentions that her instant messages were private and that her actions were not willful. In light of Appellant's prior discipline, the Department acted reasonably in dismissing Appellant from state service. The Board dismissed the appeal. One Board Member concurred in part and dissented in part, writing that the Department should not have skipped the final steps of progressive discipline and should have reinstated Appellant to the classified service.

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service, resulting in her termination from state service. Among other charges, the Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. Appellant did not tell the agency director that she had signed the lease. Appellant argued that she was simply fulfilling her duty to ensure that the lease was timely renewed so that OIB was not left to operate without a facility. Appellant also argued that her actions were authorized by the agency director's predecessor. The Board concluded that there was some merit to both parties' positions. A "higher-level manager" such as Appellant "could be expected to see, on her own initiative, if OIB's lease could be modified by way of a shorter period or a different termination clause." The Board eventually concluded, however, that an objectively reasonable employer would not have removed Appellant from the management service. Appellant's "judgment regarding the OIB lease renewal, in combination with the proven charges, warrant substantial discipline. Based on our findings, we conclude that an objectively reasonable employer would have disciplined, but not removed" Appellant, particularly given Appellant's seven years of discipline-free performance. Although Appellant "would have been better served to inform the new agency director of the OIB lease, her

failure to do so is not the type of egregious behavior where we have held removal to be the appropriate sanction.” Although some of the charges listed by the Commission were established, other charges showed that both communications and expectations were not clear between Appellant and the agency director. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department removed Appellant based on approximately eight charges, including a failure to maintain a respectful workplace, retaliation, engaging in inappropriate conduct as a supervisor, and violation of various policies and procedures. The Department proved that Appellant had (1) exercised poor judgment as a supervisor by putting a note on the desk of his executive assistant about the state of her office, making inappropriate comments about the executive assistant in two emails to a forestry manager, removing the executive assistant’s inmate grievance processing duties without prior notice or discussion, raising concerns about a motorcycle shed, and telling a colleague to disband a safety committee; and (2) smoked in state vehicles, used ATVs without the appropriate certification, and provided evasive and conflicting information during the investigation by stating that he talked with a superintendent and her assistant before reassigning the executive assistant’s grievance processing duties. The Board rejected Appellant’s argument that his violations of certain policies and procedures (related to smoking in vehicles and use of ATVs) were minor. Appellant’s actions showed a “blatant disregard” for Department policies, which, as a manager, he is expected to enforce. Appellant failed to understand that his statements and conduct with regard to his subordinate “appeared retaliatory and that his policy and procedure violations hurt his ability to serve as a manager.” Although the Board considered Appellant’s length of service, it noted that the Appellant had already been disciplined twice during his management service tenure. The Board also considered the proportionality of the discipline and the effect of Appellant’s actions on the Department. The Board dismissed the appeal.

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013): Principal Executive Manager G appealed her removal from management service and dismissal from state service. Appellant was a Region Maintenance and Operations Manager in ODOT’s highway division. Appellant was arrested for driving under the influence of intoxicants (DUII) in 1988 and again in 2008, when her driver’s license was suspended for 90 days following her entry into a diversion program. ODOT did not discipline Appellant for the 2008 event because of her length of service and because she assured her manager that she would not repeat the conduct. In 2009, Appellant was involuntarily reassigned to a different region as a result of a conflict with a coworker. Appellant received letters of concern in 2010 and 2011 for unprofessional behavior. In April 2011, Appellant was arrested and charged again with DUII. Appellant did not disclose the arrest to ODOT management for three weeks until she became aware of possible adverse press coverage of her arrest. Appellant was convicted of DUII, sentenced to a 90-day home detention, and received a lifetime driver’s license suspension. ODOT has no written policy requiring

employees to report an off-duty DUII arrest. Appellant's conduct was contrary to both a core mission of the agency—providing a safe transportation system to the state—and to its statewide campaign to discourage people from driving while intoxicated. Because Appellant committed to ODOT in 2008, after her second arrest, not to engage in this conduct in the future, her failure to timely report her repeat DUII violation resulted in a loss of trust in her as a management service employee, even though there was no written policy requiring her to report her DUII violation. Also, whether or not having a valid driver's license was a requirement of her job, ODOT reasonably determined that Appellant's loss of her license negatively affected her ability to effectively perform her job duties. Appellant's conduct also constituted misconduct because her conduct was unlawful and the result of willful, intentional actions. The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. In late 2011, he was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, Appellant was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death, including directing that the corpse be stored overnight in the infirmary food cooler, which caused concern among inmates and prison employees. Appellant did not inform his superiors of his plan to store the corpse overnight in the food cooler. The Board rejected Appellant's arguments that he notified his superiors of the inmate death, as required, and that his actions did not violate any rule. Appellant's "role as the individual in charge of a prison of 3,000 inmates required more than just not violating those rules. [Appellant's] position required him to appropriately address unforeseen situations that were not explicitly provided for in prison work rules." Appellant's failure to involve his superiors in the decisions about how to handle the corpse "reflected a disregard of his place in the chain of command." During the events in question, Appellant was aware that his "emotional intelligence and judgment were in question." Appellant's failure to acknowledge his errors in prioritizing his activities, communicating with his superior officers, and appropriately handling the situation with the corpse "support the Department's theory that a significant level of discipline was required" to get Appellant's attention. The Board dismissed the appeal.

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Appellant was responsible for supervising the building and refurbishing of armories around the state, and supervised five employees. In the presence of other employees, Appellant made a remark about a waitress at a restaurant to the effect of, "I guess a blow job is out of the question, isn't it?" Customers sitting nearby heard the remark and were offended. Appellant also made a remark to a subordinate, who had been dealing with his wife's serious illness, to the effect of, "Why don't you just shoot the bitch?" Appellant criticized and used bullying language with subordinates and vendors, at one point bringing one vendor to tears. Appellant monitored the

bathroom and coffee breaks of another employee because he believed she was taking too long, which made her feel as if she were being spied on. An investigation of Appellant's computer usage revealed that his work computer contained more than 5,000 non-work-related images, including adult cartoons, humor, family photos, and more than 100 images of nude women or couples engaged in sexual activity. Removal from management service and dismissal from state service were appropriate, even though Appellant had no prior discipline in 11 years of state service. The Department properly determined that Appellant "was not capable of performing his managerial duties, and that his 'unfitness to render effective service' was evident from his conduct." Moreover, the Department properly determined that the totality of Appellant's conduct "amounted to misconduct that undermined the Department's belief that he could faithfully perform the duties of his job" and "would not likely be improved with progressive measures," and, therefore, dismissal from state service was also appropriate. The Board dismissed the appeal.

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012): Support Supervisor 2 appealed her removal from the management service. Promoted to the management service in 1998, Appellant received a written reprimand in July 2008 for using profanity and making disrespectful and offensive remarks, among other things. In 2010, Appellant received a one-week suspension and a last chance agreement for failing to follow a manager's directive and providing false or misleading information. The last chance agreement required Appellant to refrain from inappropriate and unprofessional conduct and to adhere to DMV's supervisor expectations. In May 2011, DMV gave Appellant a memorandum reiterating the expectation that she follow "proper conduct" as a unit manager. Appellant's removal resulted from her conduct at a meeting to develop interview questions for an open management position. Appellant recommended the following question: "Even the best bosses generate complaints from their employees now and then. What complaints would the people you've managed have about you?" Several participants in the meeting suggested that the question be softened. Appellant strenuously argued for her question, spoke loudly, and raised her voice to near shouting. She slammed her open palms on the table and raised herself to make her point. Another participant, who was aware of Appellant's last chance agreement, made a gesture with her hand to attempt to signal to Appellant to stop. Appellant also interrupted another speaker and loudly said to another employee, "[Y]ou have to go! You're off and we ain't payin' overtime!" Appellant acted in an unprofessional manner and violated the expectations in the last chance agreement. The Board rejected Appellant's argument that her conduct was "mild and unremarkable." Appellant's conduct was sufficiently uncooperative and abrasive to cause a manager to raise concerns about it right after the meeting, an employee to signal to Appellant to stop talking, and another employee to decide he would never volunteer to participate in another such meeting. The Board dismissed the appeal.

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012): Investigator 3 in the Office of Investigations and Training (OIT) appealed his removal from management service. Reports of child abuse that come in during non-business hours are screened by a rotating list of on-call OIT investigators. When an on-call investigator receives a child abuse report, the investigator is required to interview the child within 24 hours, take photographs of any injuries, write an assessment, identify the perpetrators, if possible, and work with the care provider

to prepare a safety plan. Appellant, who lived in Salem, was on call and received a report on Friday evening at the beginning of Memorial Day weekend of a 12-year old in a foster facility in Portland with visible injuries. Appellant took no action that evening. Instead, the next day, Appellant asked a coworker, EW, who happened to live next door to the foster facility, to meet with the child. EW did so, and saw serious visual injuries. EW took notes and photos, and called Appellant to say that the case required a full investigation. Appellant took no action, other than to call OIT's regular screener at home to obtain the foster facility director's cell phone number. The screener reminded Appellant that he needed to obtain a safety plan immediately. Appellant contacted the director and requested a safety plan, but took no further action. DHS did not receive the safety plan until the Tuesday after Memorial Day, when another employee followed up with the facility director. The Board dismissed the appeal despite Appellant's lack of progressive discipline, concluding that after receiving verification of the child's injuries, Appellant did not contact law enforcement or appropriate medical personnel, did not contact the child, did not travel to Portland, and did not ensure that a safety plan was in place. The Board reasoned that "OIT reasonably determined that [Appellant] was not capable of performing his duties and his 'unfitness to render effective service' was evident from his mishandling of this child abuse report."

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012): Principal Executive Manager D, the Department's Fiscal Manager, appealed a one-week unpaid suspension for poor performance. Hired in 2003, Appellant received two letters of reprimand (in 2008 and in 2010), received "needs improvement" ratings on two performance evaluations, and received written expectations and a work plan for inaccurate work and inattention to detail. The Board concluded that Appellant (a) submitted a permanent finance plan for a reclassified position that contained significant errors, (b) submitted a financial year-end report/subrecipient report that she knew was likely to contain errors, (c) failed to follow up on the filing of a required quarterly report under the American Recovery and Reinvestment Act of 2009, and (d) gave her supervisor inaccurate information out of haste and ignorance regarding accounts receivable and forfeited vehicles. Some of Appellant's errors were "minor and unique," but others were examples of multiple failures to submit accurate information when accuracy was important. Viewing Appellant's actions in total, "against the background of her previous direction and reprimands," the Board concluded that "an objectively reasonable employer could have issued a one-week suspension under these circumstances." The Board dismissed the appeal.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board determined that the State proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. The Board determined that removal and dismissal were appropriate because Appellant had (1) signed timesheets that he knew, or recklessly failed to know, were inaccurate; (2) claimed that he worked on a day that he did not work due to road conditions when he knew other employees were required to take leave for that day; (3) claimed that he worked during an audit week in which he did no work; and

(4) falsely stated during the investigation and pre-termination hearing that he had worked more than 40 hours during the audit week. The Board dismissed the appeal.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): The Department placed Appellant, a human resources manager, on administrative leave pending an investigation of a complaint she had made against colleagues and subordinates. Appellant was duty stationed at home and was assigned to work on a project. Appellant was instructed to be available by phone, but was not specifically instructed to be available by email. Appellant performed some work on her project, and then stopped. As a result, deadlines passed with the work incomplete. Appellant also did not respond to emails from management about the project's progress. The Department charged Appellant with insubordination and suspended Appellant for one week. The Board determined that Appellant engaged in "unacceptable behavior" in failing to complete the project, but the Department failed to prove a charge of insubordination because she was not warned that her failure to work on the projects could result in discipline. The Board determined that a one-week suspension was excessive for unacceptable behavior and ordered the Department to set aside that discipline, make Appellant whole for any loss of pay or benefits, and issue a written reprimand.

13.36 Other

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and delaying discovery. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her twelve years of prior satisfactory service precluded discipline. The Board concluded that these factors were "irrelevant" because she was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain at Snake River Correctional Institution appealed his one-week suspension. In late 2011, Appellant was placed on a performance improvement plan to improve his supervisory professionalism. As part of the performance improvement plan, he was directed to meet with four managers to discuss his communications style and get their feedback on his performance. Appellant failed to do so. Appellant also failed to attend a mandatory captains' meeting and failed to report his absence in advance. During the same period, Appellant also made a number of judgment errors in the handling of an inmate's unexpected death. Appellant decided that the prison should hold the body overnight until the Oregon State Police could commence its investigation the next day. There was no designated place in the institution to store corpses. Appellant directed the overnight storage of the corpse in the infirmary food cooler, which caused concern among inmates and prison employees. Appellant did not inform his superiors of his plan to store the corpse overnight in the food cooler. The Board rejected Appellant's arguments that he notified his superiors of the inmate death, as required, and that his actions did not violate any rule. Appellant's "role as the individual in charge of a prison of 3,000 inmates required more than just not violating those rules. [Appellant's] position required him to appropriately address unforeseen situations that were not explicitly provided for in prison work rules." Appellant's failure to involve his superiors in the decisions about how to handle the corpse "reflected a disregard of his place in the chain of command." During the events in question, Appellant was aware that his "emotional intelligence and judgment were in question." Appellant's failure to acknowledge his errors in prioritizing his activities, communicating with his superior officers, and appropriately handling the situation with the corpse "support the Department's theory that a significant level of discipline was required" to get Appellant's attention. The Board dismissed the appeal.

Chapter 15 – Remedies

15.1 Make whole

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014): Director of Administrative Services with the Commission for the Blind (Commission) appealed her removal from the management service, resulting in her termination from state service. Among other charges, the Commission charged Appellant with using poor judgment in renewing a lease for Oregon Industries for the Blind (OIB) without consulting with the agency director, and despite Appellant's knowledge of OIB's ongoing financial and regulatory problems. The Board concluded that there was some merit to both parties' positions. A "higher-level manager" such as Appellant "could be expected to see, on her own initiative, if OIB's lease could be modified by way of a shorter period or a different termination clause." The Board eventually concluded, however, that an objectively reasonable employer would not have removed Appellant from the management service. The Board ordered the Commission to reinstate Appellant to her position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of six weeks without pay.

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014): Training and Development Specialist 2 with the Oregon State Police (OSP) appealed her removal from the management service. Appellant began her state employment at Oregon Youth Authority in a classified position. She then worked in the Secretary of State's office, in a position that the Secretary of State designated as classified, unrepresented. Subsequently, she was promoted into a management service position at OSP. In a pre-disciplinary letter, OSP informed Appellant that it was considering removing her from the management service under ORS 240.570(3). As OSP understood Appellant's restoration rights, she would not be returned to the classified service, but OSP's letter did not inform her that removal from management service would terminate her state service. During the pre-removal meeting, Appellant and her counsel both indicated that they believed that potential demotion was the result of the contemplated disciplinary action. OSP did not notify Appellant that it believed that her removal from the management service would terminate her state employment. Appellant was not afforded procedural due process as required by the Fourteenth Amendment to the United States Constitution, and therefore her removal from the management service and resulting termination from state service was invalid. In cases where a termination is invalid due to a failure to comply with the due process clause of the Fourteenth Amendment, the proper remedy is reinstatement and an award of back pay and other benefits. The employer is not prohibited from subsequently taking the same disciplinary action once it affords the employee constitutionally required procedural due process.

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013): Principal Executive Manager B with prior classified service appealed his removal from the management service and dismissal from state service. The Board ordered the Department to reinstate Appellant to a position that is equivalent to the position that he held immediately before his management service appointment, and to make him whole from the date of dismissal until reinstatement, including back pay and benefits based on the classified position to which he was restored, plus interest at the legal rate of 9 percent per annum, minus any interim earnings. The Board also ordered the Department to remove the letter of dismissal from all of its files and substitute a letter removing Appellant from the management service.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C appealed her removal from management service and dismissal from state service. The Board dismissed the appeal in part, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. When the Board finds that a dismissal was not taken in good faith for cause, it must order the employee reinstated to her former position without loss of pay; or in lieu of affirming the employer's action, it "may modify the action by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay," quoting ORS 240.560(4); *Van Dyke v. Department of Fish and Wildlife*, Case No. MA-6-01 at 32-33 (November 2002). The Board ordered the Department to reinstate Appellant to the position that she held in the classified service before her promotion to management service. It ordered the Department to make Appellant whole from December 10, 2010 until she was reinstated, including back pay and benefits, plus 9 percent interest, and minus any interim earnings. It also ordered the Department to remove the letter of

dismissal from all of its files and substitute it with a letter removing Appellant from management service. The Board concluded that this sanction was commensurate with the seriousness of Appellant's actions, yet took into account the mitigating circumstances presented in this case.

Greenwood v. Oregon Department of Forestry, Case No. MA-03-04 (July 2006), recons denied (September 2016), remedy enforced (September 2010): In the original July 2006 order, the Board determined that the Department had properly removed Appellant from the management service, but had violated ORS 240.570(5) when it dismissed her from state service. The Board ordered the Department to restore Appellant to her prior classified position and make Appellant whole with back pay and benefits from the date she was dismissed until the date of her reinstatement. After being unsuccessful at finding work before the reinstatement, Appellant had enrolled in a doctoral program. The Department reduced the back pay for the period when Appellant was a student. Four years later, Appellant challenged the reduction and also asserted that the Department (1) used an incorrect salary range in computing back pay; (2) failed to allow Appellant to contribute pretax earnings to the Oregon Savings Growth Plan (OSGP); (3) failed to make her whole for loss of optional life insurance; and (4) was obligated to pay interest on health insurance payments, unemployment benefits initially deducted but later paid, and other benefits. First, the Board determined that because Appellant worked part time as a graduate student, the Department was required to pay the difference of what she earned part time and what she would have earned working in the classified position. Second, the Board determined that the Department was required to reimburse Appellant for the cost of health insurance that she purchased through her university program. Third, the Board determined that although the Department reclassified her prior position to a higher salary range, Appellant was entitled only to her original classification and salary range. Fourth, the Board determined that the Department was not obligated to make Appellant whole for loss of optional life insurance. Fifth, the Board determined that the Department did give Appellant the opportunity to make contributions to the OSGP in an amount greater than what she would have contributed had she remained employed and continued to make monthly payments. Sixth, the Board determined that Appellant was not entitled to interest because she delayed making her claims regarding additional back pay.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): The amount of back pay and benefits will be calculated according to the formula the Board adopted in *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8853 n 28 (1986).

15.2 Remand to employer for reconsideration of action

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014): Training and Development Specialist 2 with the Oregon State Police (OSP) appealed her removal from the management service. Appellant began her state employment at Oregon Youth Authority in a classified position. She then worked in the Secretary of State's office, in a position that the Secretary of State designated as classified, unrepresented. Subsequently, she was promoted into a management service position at OSP. In a pre-disciplinary letter, OSP informed Appellant that it

was considering removing her from the management service under ORS 240.570(3). As OSP understood Appellant's restoration rights, she would not be returned to the classified service, but OSP's letter did not inform her that removal from management service would terminate her state service. During the pre-removal meeting, Appellant and her counsel both indicated that they believed potential demotion was the result of the contemplated disciplinary action. OSP did not notify Appellant that it believed that her removal from the management service would terminate her state employment. Appellant was not afforded procedural due process as required by the Fourteenth Amendment to the United States Constitution, and therefore her removal from management service and resulting termination from state service was invalid. In cases where a termination is invalid due to a failure to comply with the due process clause of the Fourteenth Amendment, the proper remedy is reinstatement and an award of back pay and other benefits. The employer is not prohibited from subsequently taking the same disciplinary action once it affords the employee the constitutionally required procedural due process.

15.4 Other remedies

Honeywell v. Department of Corrections, Case No. MA-14-10 (February 2011): Department manager appealed the Department's refusal to hire her into a Chief Investigator position after her position was eliminated. Citing ORS 240.560(4), the Board held that it had no power to grant the remedy the appellant sought—i.e., ordering the Department to hire her.

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), recons (June 2010): The Department filed a motion for reconsideration of the Board's original May 2010 order, reinstating Appellant to her prior position after a two-month demotion. The Department asserted that it could not comply with the Board's order reinstating Appellant to her prior position because she was often absent when she returned to work, created a number of problems, and ultimately resigned. As a result, she worked only 12 hours during the month before resigning. The Board declined to consider the Department's motion because it was based on factual evidence that was not part of the original record. The Board also declined to reconsider issues raised in the original case.

Chapter 16 – Evidentiary and Other Rulings

16.4 Credibility

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015): Principal Executive Manager D appealed his removal from management service and dismissal from the classified service. Among other arguments, Appellant argued that the Board should grant his appeal because the investigation into his behavior had been conducted by a Department human resources manager who was terminated for falsifying information on state job application materials. The Board rejected this argument, reasoning that it was not relying on the human resources manager's credibility, "but rather the credibility of the reviewed and signed statements

of the witnesses, along with [Appellant's] own statements and written submissions to the State, which confirmed many details of the witnesses' statements." Moreover, the human resources manager was not a decision maker regarding Appellant's discipline, and the Board gave "little weight" to the human resources manager's opinions and recommendations in his report. The Board dismissed the appeal.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain at Snake River Correctional Institution appealed his one-week suspension. Appellant chose not to testify at the hearing. This Board, therefore, derived Appellant's factual contentions from his reported statements in his disciplinary proceedings, which were exhibits in the case, and as recounted at hearing by witnesses, as well as other exhibits.

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011): The Board considered Appellant's attack on the credibility of witnesses who testified about meetings with Appellant. Appellant argued that their testimony was too contradictory, inaccurate, and vague to be reliable. The Board held that any inaccuracies in these witnesses' testimony were insufficient to make their entire testimony unreliable. Although one witness's notes and testimony regarding the timing of a meeting were inconsistent with the other evidence, the witness's testimony about what occurred at the meeting was similar to Appellant's. Another witness's confusion over the exact date of a meeting that occurred six months before the hearing was insignificant, especially because the witness's recollection of what occurred at the meeting was essentially supported by Appellant's testimony. The testimony of two other witnesses, although it contained minor inconsistencies, was similar enough to be credible.

Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010): Correctional lieutenant was removed from the management service and dismissed from state service. Appellant was responsible for maintaining daily rosters and reviewing employee timesheets. The Department removed Appellant for misrepresenting hours worked on his own timesheets and being dishonest in the disciplinary process. The Board concluded that the Department proved the charges and appropriately removed and dismissed Appellant because of his dishonesty. With respect to Appellant's credibility, the Board wrote, "When a witness's testimony is false in one part, the rest of that witness's testimony should be distrusted," citing *Wesley v. Employment Department*, Case No. MA-20-02 (2003).

16.9 Relevance

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), appeal pending: Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required

to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and delaying discovery. Appellant submitted information to the district attorney's office's Brady Review Committee, including 113 pages of supporting documents from the relevant Department child welfare files. Appellant was in fact placed on the Brady list. Appellant sought to admit the 113 pages as evidence of her lack of culpability regarding the issues raised by the district attorney. The Department argued that the evidence was irrelevant because the merits of the decision to put Appellant on the Brady list were irrelevant; only the facts of the Brady listing and its scope were relevant. The documents were properly excluded as irrelevant because the Department had no control over the district attorney's decision or its consequences for child welfare cases.

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), recons (March 2015), aff'd without opinion, 277 Or App 783, 376 P3d 304 (2016): Principal Executive Manager C appealed his removal from the management service and dismissal from the classified service. One of Appellant's subordinates, EL, a classified employee, was harassed by another classified employee. From August 2011 through 2013, the harasser subjected EL to unwelcome behavior on a number of occasions, including putting EL on mailing lists for gay-themed materials (resulting in EL receiving gay pornography at work), referring to a fictitious "male gay black lover" of EL, changing EL's computer wallpaper to include an image of scantily clad men in Speedo swimsuits, and leaving a vulgar note on the back of EL's car that implied that EL was gay. EL ultimately submitted a tort claim notice, which resulted in an investigation confirming the inappropriate behavior. Appellant objected to the admission of the 79-page investigation report, prepared by a Special Assistant Attorney General. Appellant argued that the report included speculative and "probabilistic" conclusions, was ambiguous, and summarized admissions of the witnesses in a "loose, narrative style." The administrative law judge properly admitted the report under OAR 115-010-0050(1). Such reports are "frequently prepared by investigators in disciplinary matters, and employers often rely on these reports in determining whether discipline is appropriate." Further, to the extent any of the witness interviews were summarized incorrectly in the report, Appellant had the opportunity to call the witnesses to testify at the hearing, and Appellant himself had the opportunity to testify directly about any inaccuracies in the report's summaries.

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014): Principal Executive Manager C and the Commander of the South Fork Forest Camp appealed his removal from the management service. The Department objected to admission of a record of telephone calls on Department cell phones or land lines. The Department argued that the record was not relevant to the issue of what was said during those calls. The administrative law judge reserved ruling on the admission of the record. The Board rejected the Department's argument. The record was relevant to the issue of whether telephone conversations occurred. The record was admitted.

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010): Administrative Specialist 2, a classified unrepresented employee, was dismissed from state service for misconduct, malfeasance, and other

unfitness. Appellant's job duties involved determining applicants' eligibility for health plan coverage stipends provided by his employer. Appellant had access to multiple confidential state databases. Appellant was terminated after he gave a manager in another department confidential information (see *Schafer v. Department of Human Services*, Case No. MA-14-09 (June 2010)). Appellant obtained the confidential information through his access to confidential state databases. The manager, a friend of Appellant, had no proper business purpose to obtain the information. The employer offered as evidence a series of emails between Appellant and the other manager. Appellant objected on the grounds that the emails were not the basis for his discipline, and were printed after his discipline. The administrative law judge properly admitted the emails as relevant evidence of the nature and course of communications between Appellant and the other manager in the relevant period.

16.12 Timeliness (see also 5.2.2)

Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016): Principal Executive Manager D, a section manager for the Oregon Medical Marijuana Program, appealed her removal from the management service as a result of a reorganization and layoff. In a prehearing order dated October 6, 2015, the administrative law judge (ALJ) directed the parties to exchange exhibits and exhibit lists by October 8. The parties appeared for the hearing on October 15, and the ALJ postponed the hearing until December 7 at Appellant's request. Appellant did not identify any proposed exhibits until the reopening of the hearing on December 7. The ALJ properly excluded those exhibits offered by Appellant to which OHA objected. Appellant did not show good cause for failing to list and exchange exhibits before the hearing. Although the time between the prehearing notice and the first hearing date was short, Appellant had well over a month to prepare and exchange exhibits before the continued hearing date, and she consulted with counsel during that time.

Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015): Appellant was terminated on January 23, 2014, and did not file an appeal with the Board until August 1, 2014, 190 days later. ORS 240.560(1) provides that an appeal is timely if filed no later than 30 days after the effective date of the personnel action. Appellant argued that her late filing should be excused because the employer did not inform her of her appeal rights to the Board. Appellant relied on ORS 183.415(1), a statute in the Administrative Procedures Act (APA) related to contested case hearings, which states that "persons affected by actions taken by state agencies have a right to be informed of their rights and remedies" with respect to agency actions. Appellant argued that this statute required the employer to inform her of her appeal rights to the Board. The Board rejected this argument. ORS 183.415 applies to *contested cases*, not to employment disciplinary actions by a state agency involving one of its own employees. The Board also rejected Appellant's argument that her termination letter was an "order" within the meaning of the APA. Relying on *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977), the Board wrote that there is no statutory duty to inform a discharged employee of the proper appeal procedure, although the "better practice" is to include a notice of appeal in a termination letter. The Board dismissed the appeal as untimely.

Matheson v. Secretary of State, Case No. MA-009-14 (June 2014): Appellant alleged that she was improperly dismissed from her position as an executive assistant with the Oregon Secretary of State, a position in the unclassified service, and subsequently provided a 90-day limited duration position with the Oregon Department of Transportation. Appellant asked that her permanent status with the state be restored. The Board dismissed the appeal because (1) the Board lacks jurisdiction over termination appeals from an unclassified executive service position, and (2) the appeal was filed more than 30 days after Appellant’s release from the Secretary of State.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain at Snake River Correctional Institution appealed his one-week suspension. At hearing, Respondent offered Appellant’s own proposed performance improvement plan, submitted before the events at issue in the case, as an exhibit. Appellant objected on the basis that the document was not listed on the Respondent’s prehearing exhibit list. The ALJ’s prehearing order stated in part, “Pursuant to OAR 115-010-0068(2), you are directed to do the following: * * * By seven days prior to the hearing date, mail or deliver to the other parties all exhibits and an exhibit list regarding your case-in-chief (exhibits offered at hearing that were not mailed or delivered seven days before the hearing will be received only upon a showing of good cause under OAR 115-010-0068(4)).” Respondent offered other exhibits relevant to Appellant’s performance improvement process. Respondent’s rationale for failing to list the document—that it did not know that Appellant would contest the purpose of a meeting at the start of the performance improvement process—did not establish good cause. The ALJ acted within his discretion in sustaining the objection and declining to receive the exhibit.

Marshall v. Oregon Health Authority, Case No. MA-31-12 (December 2012): Employee appealed his removal from the management service due to a reorganization, effective July 31, 2012. On August 22, 2012, Appellant sent an email to the Board in which he wrote that he believed the elimination of his position was possibly unlawful and retaliatory. Appellant wrote that he was “a little confused about how to proceed with a possible complaint.” A Board employee responded by email the same day and directed Appellant to information on the Board’s website about how to file an appeal under the State Personnel Relations Law. Appellant submitted an appeal on October 24, 2012, 85 days after the effective date of the layoff. In response to an inquiry from the administrative law judge to show cause why the complaint should not be dismissed, Appellant contended that his August 22 email should be considered by the Board as a timely appeal. The Board rejected this argument. Appellant was aware that the Board employee interpreted his August 22 email as a request for information, and despite the fact that there were still eight days remaining at that point for Appellant to file a timely appeal, he did not do so. The Board dismissed the October 24 appeal as untimely.

Furqan v. Department of Human Services, Case No. MA-16-12 (July 2012), recons (August 2012): Pursuant to ORS 240.570(3), Appellant sought to appeal a written reprimand with an effective date of May 29, 2012. On June 29, 2012, 31 days after the effective date of the reprimand, Appellant submitted the appeal to the Board’s offices via fax. Appeals must be filed

within the 30-day limitation period established by ORS 240.560(1). The Board dismissed the appeal as untimely. On reconsideration, the Board rejected Appellant's argument that she mistakenly believed her appeal was timely. The Board strictly adheres to the timelines for filing appeals because a party's failure to meet the statutorily required deadline deprives the Board of jurisdiction.

16.13 Other

Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015): Appellant was terminated on January 23, 2014 and did not file an appeal with the Board until August 1, 2014, 190 days later. ORS 240.560(1) provides that an appeal is timely if filed no later than 30 days after the effective date of the personnel action. Appellant argued that her late filing should be excused because the employer did not inform her of her appeal rights to the Board. Appellant relied on ORS 183.415(1), a statute in the Administrative Procedures Act (APA) related to contested case hearings, which states that "persons affected by actions taken by state agencies have a right to be informed of their rights and remedies" with respect to agency actions. Appellant argued that this statute required the employer to inform her of her appeal rights to the Board. The Board rejected this argument. ORS 183.415 applies to *contested cases*, not to employment disciplinary actions by a state agency involving one of its own employees. The Board also rejected Appellant's argument that her termination letter was an "order" within the meaning of the APA. Relying on *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527, *rev den*, 278 Or 393 (1977), the Board wrote that there is no statutory duty to inform a discharged employee of the proper appeal procedure, although the "better practice" is to include a notice of appeal in a termination letter. The Board dismissed the appeal as untimely.

Culver v. Department of Human Services for Aging and People with Disabilities, Case No. MA-002-13 (May 2013): When considering dismissal of an appeal without a hearing, the Board assumes the allegations in the appeal are true. The Board also relies on undisputed facts discovered during its investigation, citing *Miller v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-010-10 at 2 (April 2011). For other cases stating this principle, see also *Looney v. Oregon Military Department*, Case No. MA-07-13 (September 2013); *Wilaby v. Oregon Military Department*, Case No. MA-039-12 (January 2013); *Woosley v. Department of Agriculture*, Case No. MA-012-13 (November 2013).

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013): Human Resources Analyst 3 appealed his removal from the management service for representing a mail-order life-experience "degree" as a bachelor's degree in state job applications. At hearing, Appellant contended that he submitted additional documents to the degree mill to obtain his degree. Because Appellant failed to supply those documents to the Department when asked during its investigation and failed to produce those documents at the time of hearing, the Board refused to consider them.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain at Snake River Correctional Institution appealed his one-week suspension. Appellant called only one witness. During cross-examination, Appellant objected to a series of Respondent's questions as beyond the scope of the direct examination. The ALJ sustained some of these objections and overruled others. The Board ruled that the ALJ acted within his discretion in concluding that two of the questions he permitted did in fact exceed the scope of direct examination, and he properly declined to consider the evidence produced through those questions.

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013): Correctional captain appealed his one-week suspension. Appellant objected that a small number of requested documents were not produced during his disciplinary proceedings, but were produced before the hearing. The Board concluded that Appellant did not identify any impact of this alleged withholding of documents on his discipline or this proceeding. Therefore, the Board overruled the objection.

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011): Principal Executive Manager C in the Department of Human Service's Office of Vocational Rehabilitation Services appealed her removal from management service and dismissal from state service. The Board dismissed the appeal in part, but granted Appellant's challenge of her dismissal from state service on the basis of misconduct. Appellant, although not personally biased, had told a subordinate that an employee's sexual orientation would be a factor in her promotion decision because of the discriminatory opinions of some other employees, thus demonstrating poor judgment and breaching the confidentiality of the hiring process. Appellant sought to introduce into evidence a decision from the Office of Administrative Hearings addressing her application for unemployment benefits. ORS 657.273 restricts the use of findings, orders and judgments arising out of unemployment hearings in other civil proceedings. Accordingly, the unemployment benefits decision was not admissible in this proceeding and was properly excluded, citing *Chan v. Leach and Stubblefield, Clackamas Community College*; and *McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 565 (2006).

Miller v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-10-10 (April 2011): Principal Executive Manager B appealed the Department's refusal to allow her to rescind her resignation. The Board held that, pursuant to ORS 240.570(2), it had no jurisdiction over the Department's refusal to allow rescission of the resignation unless the resignation met the conditions for a constructive discharge. The Board noted that when considering dismissing an appeal without a hearing, it assumes that the allegations contained in the appeal documents are true.

Greenwood v. Oregon Department of Forestry, MA-03-04 (July 2006), recons denied (September 2016), remedy enforced (September 2010): In the original July 2006 order, the Board determined that the Department had properly removed Appellant from the management service, but had violated ORS 240.570(5) when it dismissed her from state service. The Board

ordered the Department to restore Appellant to a classified position and make Appellant whole with back pay and benefits from the date she was dismissed until the date of her reinstatement. Four years later, Appellant challenged the Department's back pay amounts on several different bases. It was not until the hearing that Appellant presented evidence regarding the Department's computation of back pay and whether the Department failed to allow her to contribute pretax earnings to the Oregon Savings Growth Plan. The administrative law judge (ALJ) permitted the evidence and arguments over the Department's objection. The Board determined that it was in everyone's best interest to address all issues in a single hearing and the ALJ had cured any prejudice to the Department by allowing a second day of hearing when the Department was able to present rebuttal evidence.

**The SPRL Digest Alphabetical Index of Cases 2009-2016
By Appellant and Respondent**

Albertson v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-036-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Bathke v. Oregon Health Authority, Case No. MA-012-15 (March 2016) (8.4, 12.1, 12.3.6, 12.3.7)

Bell v. Department of Transportation, Case No. MA-14-12 (December 2012) (6.2, 6.5, 12.1, 12.2, 12.3.5, 12.3.7, 12.5, 13.7, 13.35)

Benda v. Department of Forestry, Case No. MA-025-12 (November 2012) (1.2, 1.3, 12.3.6, 12.3.14, 12.3.17)

Blank v. Construction Contractors Board, Case No. MA-007-14 (December 2014), *recons* (March 2015), *aff'd without opinion*, 277 Or App 783, 376 P3d 304 (2016) (3.14, 3.17a, 3.19, 6.2, 6.7, 12.1, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.5, 13.12a, 13.35, 16.9)

Boaz v. Office of Private Health Partnerships, Family Health Insurance Assistance Program, Case No. MA-10-09 (November 2010) (3.11, 3.14, 6.8, 11.2.1, 11.3, 13.8, 13.12a, 16.9)

Brosmore v. Oregon Youth Authority, Case No. MA-027-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)

Buehler v. Employment Department, Case No. MA-17-12 (March 2013) (6.10, 12.1, 12.2, 12.3.7, 12.3.8, 12.5, 13.7, 13.9, 13.15, 13.21, 13.27)

Business Development Department, Jackson v., Case No. MA-002-16 (May 2016) (1.3, 5.2.5, 12.3.15)

Castillo-Middel v. Department of Human Services, Case No. MA-013-14 (December 2015) (3.20a, 5.2.3, 12.1, 12.3.11, 12.5, 13.35)

Christensen v. Department of Administrative Services, Case No. MA-6-09 (April 2009) (1.5, 5.2.5)

Clinton v. Oregon Military Department, Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015) (6.5, 11.1, 12.1, 12.2, 12.3.8, 12.5, 13.7, 13.12a, 13.18, 13.23, 13.27, 13.34, 13.35, 16.4)

Commission for the Blind, Jones v., Case No. MA-002-14 (September 2014) (3.19, 12.1, 12.2, 12.3.1, 12.3.5, 12.3.9, 12.5, 13.15, 13.34, 13.35, 15.1)

Construction Contractors Board, Blank v., Case No. MA-007-14 (December 2014), *recons* (March 2015), *aff'd without opinion*, 277 Or App 783, 376 P3d 304 (2016) (3.14, 3.17a, 3.19, 6.2, 6.7, 12.1, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.5, 13.12a, 13.35, 16.9)

Cook v. Oregon Housing and Community Services, Case No. MA-10-12 (July 2012) (1.2)

Culver v. Department of Human Services for Aging and People with Disabilities, Case No. MA-002-13 (May 2013) (1.3, 12.3.3, 16.13)

Department of Administrative Services, Christensen v., Case No. MA-06-09 (April 2009) (1.5, 5.2.5)

Department of Administrative Services, Morin v., Case No. MA-020-12 (November 2012) (1.2, 1.3, 12.3.6, 12.3.14, 12.3.17)

Department of Agriculture, Woosley v., Case No. MA-012-13 (November 2013) (1.2)

Department of Consumer and Business Services, Wargnier v., Case No. MA-09-10 (September 2010) (5.2.2)

Department of Corrections, Oregon State Penitentiary, Dickey v., Case No. MA-8-08 (May 2009) (1.3, 2.1, 4.1, 4.2, 12.1, 12.3.11, 13.12a)

Department of Corrections, Harlow v., Case No. MA-028-12 (January 2014) (3.19, 12.1, 12.2, 12.3.7, 12.5, 13.12a, 13.17, 13.18, 13.32, 13.34, 13.35, 16.9)

Department of Corrections, Honeywell v., Case No. MA-14-10 (February 2011) (1.3, 1.7, 12.3.17, 15.4)

Department of Corrections, Mabe v., Case No. MA-09-09 (July 2010) (3.11, 3.14, 3.17a, 3.19, 4.2, 6.8, 12.1, 12.3.1, 12.3.5, 12.3.8, 13.20, 13.28, 13.34, 13.35, 16.4)

Department of Corrections, Palmer v., Case No. MA-015-14 (August 2015) (1.3, 3.20a, 12.1, 12.3.3, 12.3.10, 12.3.11, 12.5, 13.12a, 13.15, 13.17, 13.18, 13.20, 13.20)

Department of Corrections, Salchenberger v., Case No. MA-19-12 (July 2013) (6.2, 8.6, 12.1, 12.2, 12.3.9, 12.5, 13.35, 13.36, 16.4, 16.12, 16.13)

Department of Forestry, Benda v., Case No. MA-025-12 (November 2012) (1.2, 1.3, 12.3.6, 12.3.14, 12.3.17)

Department of Forestry, Greenwood v., Case No. MA-03-04 (July 2006), *recons denied* (September 2006), *remedy enforced* (September 2010) (15.1, 16.13)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Albertson v., Case No. MA-036-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services for Aging and People with Disabilities, Culver v., Case No. MA-002-13 (May 2013) (1.3, 12.3.3, 16.13)

Department of Human Services, Castillo-Middel v., Case No. MA-013-14 (December 2015) (3.20a, 5.2.3, 12.1, 12.3.11, 12.5, 13.35)

Department of Human Services, Epling v., Case No. MA-022-14 (February 2015) (1.2)

Department of Human Services, Furqan v., Case No. MA-16-12 (July 2012), *recons* (August 2012) (5.2.2, 16.12)

Department of Human Services, Garrett v., Case No. MA-02-11 (December 2011) (3.14, 3.17a, 3.19, 4.2, 12.1, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.8, 13.13, 13.14, 13.34, 15.1, 16.13)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Hill v., Case No. MA-035-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Holton v., Case No. MA-037-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Maceira-Klever v., Case No. MA-032-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, McMillion v., Case No. MA-033-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services, Seniors and People with Disabilities, Miller v., Case No. MA-10-10 (April 2011) (1.3, 3.7, 12.1, 12.3.2, 12.3.17, 16.13)

Department of Human Services, Nash v., Case No. MA-008-14 (December 2014) (3.12, 3.14, 4.2, 12.1, 12.3.1, 12.3.8, 13.7, 13.9, 13.12a, 13.16, 13.18, 13.23, 13.35)

Department of Human Services, Rodriguez v., Case No. MA-14-11 (July 2012) (6.8, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.5, 13.35)

Department of Human Services, Schafer v., Case No. MA-14-09 (June 2010) (12.1, 12.3.9, 13.7, 13.8, 13.12a, 13.14)

Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Shoff v., Case No. MA-034-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Department of Human Services, Shult v., Case No. MA-003-16 (September 2016), *appeal pending* (1.3, 2.1, 3.22, 11.2.1, 12.1, 12.3.1, 12.3.5, 12.5, 13.36, 16.9)

Department of Human Services, Office of Human Resources, Solis Torres v., Case No. MA-020-09 (June 2010) (5.2.5)

Department of Human Services, Templeton v., Case No. MA-020-15 (April 2016) (5.2.5)

Department of Human Services, Tucker v., Case No. MA-04-10 (May 2010) (1.2, 5.2.5)

Department of Human Services, Tucker v., Case No. MA-06-11 (September 2011) (1.3, 12.3.3)

Department of Human Services, Zaman v., Case No. MA-21-12 (April 2013) (3.13a, 3.14, 4.2, 6.8, 11.1, 12.1, 12.2, 12.3.1, 12.3.5, 12.3.7, 12.3.8, 13.9, 13.15, 15.1)

Department of State Lands, Konstant v., Case No. MA-20-10 (May 2012) (3.19, 4.1, 12.1, 12.2, 12.3.9, 13.35)

Department of Transportation, Bell v., Case No. MA-14-12 (December 2012) (6.2, 6.5, 12.1, 12.2, 12.3.5, 12.3.7, 12.5, 13.7, 13.35)

Department of Transportation, Keller v., Case No. MA-007-10 (December 2010) (1.9, 3.9, 12.3.13, 13.7)

Department of Transportation, Keller v., Case No. MA-17-11 (September 2013) (1.9, 3.14, 3.17a, 6.6, 6.10, 12.1, 12.2, 12.3.1, 12.3.8, 12.5, 13.3, 13.15, 13.21, 13.32, 13.34, 13.35)

Dickey v. Department of Corrections, Oregon State Penitentiary, Case No. MA-8-08 (May 2009) (1.3, 2.1, 4.1, 4.2, 12.1, 12.3.11, 13.12a)

Dubrow v. Parks and Recreation Department, Case No. MA-03-09 (May 2010), *recons* (June 2010) (1.3, 2.1, 3.12, 3.17a, 4.5, 8.6, 9.1, 12.1, 12.2, 12.3.4, 12.3.9, 12.5, 13.7, 13.16, 13.35, 15.1, 15.4)

Employment Department, Buehler v., Case No. MA-17-12 (March 2013) (6.10, 12.1, 12.2, 12.3.7, 12.3.8, 12.5, 13.7, 13.9, 13.15, 13.21, 13.27)

Epling v. Department of Human Services, Case No. MA-022-14 (February 2015) (1.2)

Furqan v. Department of Human Services, Case No. MA-16-12 (July 2012), *recons* (August 2012) (5.2.2, 16.12)

Garrett v. Department of Human Services, Case No. MA-02-11 (December 2011) (3.14, 3.17a, 3.19, 4.2, 12.1, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.8, 13.13, 13.14, 13.34, 15.1, 16.13)

Geck v. Oregon Military Department, Case No. MA-22-12 (May 2013) (6.5, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.20, 16.13)

Greenwood v. Oregon Department of Forestry, MA-03-04 (July 2006), *recons denied* (September 2016), *remedy enforced* (September 2010) (15.1, 16.13)

Harlow v. Department of Corrections, Case No. MA-028-12 (January 2014) (3.19, 12.1, 12.2, 12.3.7, 12.5, 13.12a, 13.17, 13.18, 13.32, 13.34, 13.35, 16.9)

Harper v. Parks and Recreation Department, Case No. MA-029-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)

Hill v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-035-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Hogstad v. Marion County, Case No. MA-18-10 (January 2011) (1.3, 3.24, 5.25)

Holcomb v. Oregon Health Authority, Case No. MA 13-11 (April 2012) (5.25, 12.3.6, 12.3.14, 12.3.17)

Holton v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-037-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Honeywell v. Department of Corrections, Case No. MA-14-10 (February 2011) (1.3, 1.7, 12.3.17, 15.4)

Hume-Bustos v. Oregon State Police, Case No. MA-010-13 (May 2014) (2.1, 4.1, 4.2, 15.1, 15.2)

Jackson v. Business Development Department, Case No. MA-002-16 (May 2016) (1.3, 5.2.5, 12.3.15)

Jones v. Commission for the Blind, Case No. MA-002-14 (September 2014) (3.19, 12.1, 12.2, 12.3.1, 12.3.5, 12.3.9, 12.5, 13.15, 13.34, 13.35, 15.1)

Keller v. Department of Transportation, Case No. MA-007-10 (December 2010) (1.9, 3.9, 12.3.13, 13.7)

Keller v. Department of Transportation, Case No. MA-17-11 (September 2013) (1.9, 3.14, 3.17a, 6.6, 6.10, 12.1, 12.2, 12.3.1, 12.3.8, 12.5, 13.3, 13.15, 13.21, 13.32, 13.34, 13.35)

Konstant v. Department of State Lands, Case No. MA-20-10 (May 2012) (3.19, 4.1, 12.1, 12.2, 12.3.9, 13.35)

Looney v. Oregon Military Department, Case No. MA-07-13 (September 2013) (4.5)

Lucht v. Public Employees Retirement System, Case No. MA-16-10 (December 2011) (3.17a, 3.19, 12.1, 12.3.8, 12.5, 13.9, 13.12a, 13.13, 13.14, 13.15, 13.18, 13.23, 16.4)

- Mabe v. Department of Corrections, Case No. MA-09-09 (July 2010) (3.11, 3.14, 3.17a, 3.19, 4.2, 6.8, 12.1, 12.3.1, 12.3.5, 12.3.8, 13.20, 13.28, 13.34, 13.35, 16.4)
- Maceira-Klever v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-032-12 (January 2013) (1.3, 12.3.6, 12.3.14)
- Marion County, Hogstad v., Case No. MA-18-10 (January 2011) (1.3, 3.24, 5.2.5)
- Marshall v. Oregon Health Authority, Case No. MA-31-12 (December 2012) (3.3, 5.2.2, 16.12)
- Matheson v. Secretary of State, Case No. MA-009-14 (June 2014) (1.4, 5.2.2, 16.12)
- McMillion v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-033-12 (January 2013) (1.3, 12.3.6, 12.3.14)
- Miller v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-10-10 (April 2011) (1.3, 3.7, 12.1, 12.3.2, 12.3.17, 16.13)
- Miller v. Oregon Racing Commission, Case No. MA-014-14 (December 2015) (4.1, 4.2, 5.2.2, 16.12, 16.13)
- Moll v. Parks and Recreation Department, Case No. MA-009-13 (October 2013), *recons* (December 2013) (1.3, 12.3.3, 12.3.7)
- Morin v. Department of Administrative Services, Case No. MA-020-12 (November 2012) (1.2, 1.3, 12.3.6, 12.3.14, 12.3.17)
- Nash v. Department of Human Services, Case No. MA-008-14 (December 2014) (3.12, 3.14, 4.2, 12.1, 12.3.1, 12.3.8, 13.7, 13.9, 13.12a, 13.16, 13.18, 13.23, 13.35)
- Neal v. State Operated Community Programs, Case No. MA-18-09 (October 2009) (1.2)
- Nichols v. Oregon Health Authority, Oregon State Hospital, Case No. MA-030-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)
- Nichols v. Oregon Health Authority, Case No. MA-018-15 (May 2016) (2.1, 8.1, 8.4, 12.3.6, 16.12)
- Office of Private Health Partnerships, Family Health Insurance Assistance Program, Boaz v., Case No. MA-10-09 (November 2010) (3.11, 3.14, 6.8, 11.2.1, 11.3, 13.8, 13.12a, 16.9)
- Oregon Health Authority, Bathke v., Case No. MA-012-15 (March 2016) (8.4, 12.1, 12.3.6, 12.3.7)
- Oregon Health Authority, Holcomb v., Case No. MA 13-11 (April 2012) (5.2.5, 12.3.6, 12.3.14, 12.3.17)

- Oregon Health Authority, Marshall v., Case No. MA-31-12 (December 2012) (3.3, 5.2.2, 16.12)
- Oregon Health Authority, Oregon State Hospital, Nichols v., Case No. MA-030-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)
- Oregon Health Authority, Nichols v., Case No. MA-018-15 (May 2016) (2.1, 8.1, 8.4, 12.3.6, 16.12)
- Oregon Health Authority, Ries-Fahey v., Case No. MA-016-15 (February 2016) (1.3, 8.4, 8.6, 11.2.10, 12.3.6)
- Oregon Health Authority, Rux v., Case No. MA-08-12 (December 12, 2012), *nunc pro tunc order* (December 14, 2012) (12.1, 12.3.6)
- Oregon Health Authority, Stigers v., Case No. MA-010-15 (May 2016) (1.2, 3.17, 11.2.10, 12.3.6)
- Oregon Health Authority, Weston v., Case No. MA-015-15 (November 2015) (1.3, 12.3.6)
- Oregon Housing and Community Services, Cook v., Case No. MA-10-12 (July 2012) (1.2)
- Oregon Military Department, Clinton v., Case No. MA-016-11 (June 2013), *aff'd without opinion*, 268 Or App 717, 344 P3d 567, *rev den*, 357 Or 299, 353 P3d 594 (2015) (6.5, 11.1, 12.1, 12.2, 12.3.8, 12.5, 13.7, 13.12a, 13.18, 13.23, 13.27, 13.34, 13.35, 16.4)
- Oregon Military Department, Geck v., Case No. MA-22-12 (May 2013) (6.5, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.20, 16.13)
- Oregon Military Department, Looney v., Case No. MA-07-13 (September 2013) (4.5)
- Oregon Military Department, Wilaby v., Case No. MA-039-12 (January 2013) (1.3, 12.3.6, 12.3.14)
- Oregon Racing Commission, Miller v., Case No. MA-014-14 (December 2015) (4.1, 4.2, 5.2.2, 16.12, 16.13)
- Oregon State Police, Hume-Bustos v., Case No. MA-010-13 (May 2014) (2.1, 4.1, 4.2, 15.1, 15.2)
- Oregon Youth Authority, Brosmore v., Case No. MA-027-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)
- Oregon Youth Authority, True v., Case No. MA-026-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)
- Palmer v. Department of Corrections, Case No. MA-015-14 (August 2015) (1.3, 3.20a, 12.1, 12.3.3, 12.3.10, 12.3.11, 12.5, 13.12a, 13.15, 13.17, 13.18, 13.20, 13.27)
- Parks and Recreation Department, Dubrow v., Case No. MA-03-09 (May 2010), *recons* (June 2010) (1.3, 2.1, 3.12, 3.17a, 4.5, 8.6, 9.1, 12.1, 12.2, 12.3.4, 12.3.9, 12.5, 13.7, 13.16, 13.35, 15.1, 15.4)

Parks and Recreation Department, Harper v., Case No. MA-029-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)

Parks and Recreation Department, Moll v., Case No. MA-009-13 (October 2013), *recons* (December 2013) (1.3, 12.3.3, 12.3.7)

Pasco v. Portland State University, Case No. MA-15-12 (July 2012) (1.11)

Poage v. Department of Corrections, Case No. MA-17-10 (April 2012) (1.9, 3.19, 6.8, 6.13, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.13, 13.34)

Portland State University, Pasco v., Case No. MA-15-12 (July 2012) (1.11)

Public Employees Retirement System, Lucht v., Case No. MA-16-10 (December 2011) (3.17a, 3.19, 12.1, 12.2, 12.3.9, 13.35)

Ries-Fahey v. Oregon Health Authority, Case No. MA-016-15 (February 2016) (1.3, 8.4, 8.6, 11.2.10, 12.3.6)

Rodriguez v. Department of Human Services, Case No. MA-14-11 (July 2012) (6.8, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.5, 13.35)

Rux v. Oregon Health Authority, Case No. MA-08-12 (December 12, 2012), *nunc pro tunc order* (December 14, 2012) (12.1, 12.3.6)

Salchenberger v. Department of Corrections, Case No. MA-19-12 (July 2013) (6.2, 8.6, 12.1, 12.2, 12.3.9, 12.5, 13.35, 13.36, 16.4, 16.12, 16.13)

Schafer v. Department of Human Services, Case No. MA-14-09 (June 2010) (12.1, 12.3.9, 13.7, 13.8, 13.12a, 13.14)

Secretary of State, Matheson v., Case No. MA-009-14 (June 2014) (1.4, 5.2.2, 16.12)

Shoff v. Department of Human Services, Central Services, Office of Adult Abuse Prevention and Investigations, Case No. MA-034-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Shult v. Department of Human Services, Case No. MA-003-16 (September 2016), *appeal pending* (1.3, 2.1, 3.22, 11.2.1, 12.1, 12.3.1, 12.3.5, 12.5, 13.36, 16.9)

Solis Torres v. Department of Human Services, Office of Human Resources, Case No. MA-020-09 (June 2010) (5.2.5)

State Operated Community Programs, Neal v., Case No. MA-18-09 (October 2009) (1.2)

Stigers v. Oregon Health Authority, Case No. MA-010-15 (May 2016) (1.2, 3.17, 11.2.10, 12.3.6)

Templeton v. Department of Human Services, Case No. MA-020-15 (April 2016) (5.2.5)

True v. Oregon Youth Authority, Case No. MA-026-12 (November 2012) (1.3, 12.3.6, 12.3.14, 12.3.17)

Tucker v. Department of Human Services, Case No. MA-04-10 (May 2010) (1.2, 5.2.5)

Tucker v. Department of Human Services, Case No. MA-06-11 (September 2011) (1.3, 12.3.3)

Wagnier v. Department of Consumer and Business Services, Case No. MA-09-10 (September 2010) (5.2.2)

Weston v. Oregon Health Authority, Case No. MA-015-15 (November 2015) (1.3, 12.3.6)

Wilaby v. Oregon Military Department, Case No. MA-039-12 (January 2013) (1.3, 12.3.6, 12.3.14)

Woosley v. Department of Agriculture, Case No. MA-012-13 (November 2013) (1.2)

Zaman v. Department of Human Services, Case No. MA-21-12 (April 2013) (3.13a, 3.14, 4.2, 6.8, 11.1, 12.1, 12.2, 12.3.1, 12.3.5, 12.3.7, 12.3.8, 13.9, 13.15, 15.1)

Alphabetical Index of Topics

Absenteeism as cause for discipline or removal, 13.2.
Administrative law judges, Workers Compensation Board, 1.15, 19.1.
Affirmative defenses generally, 6.
Alcohol-related conduct as cause for discipline or removal, 13.3.
Allocation of position, classified employees, on and after July 1, 1981, 11.2.10.
Allocation of position effective before July 1, 1981, 10.2.10.
Allocation of position, management service employees, 12.3.14.
Appeal procedure generally, 5.
Appeals of actions effective before July 1, 1981, generally, 10.
Appropriateness of personnel action, classified employees, on and after July 1, 1981, 11.3.
Appropriateness of personnel action effective before July 1, 1981, 10.3.
Appropriateness of personnel action, management service employees, 12.5.
“Arbitrary,” ORS 240.086(1), 3.4.
Assignment of management service employees, 12.3.13.
“Bad faith” (not in good faith), ORS 240.560(4), 3.6.
Bad faith employer actions as an affirmative defense, 6.2.
Board and appellate court review generally, 9.
Board review and order, 9.1.
Burden of proof, 8.4.
Cause for discipline or removal generally, 13.
Cell phone, misuse of, 13.12a.
Civil rights and other laws, ERB jurisdiction, 1.9.
Classified employees’ appeals of actions effective on and after July 1, 1981, generally, 11.
Classified employees included in bargaining unit, ERB jurisdiction, 1.2.
Classified employees not included in bargaining unit, ERB jurisdiction, 1.1.
Collateral estoppel, 16.2.
Computer system, misuse of, 13.12a.
Conduct (abusive/negative/interpersonal conflicts) as cause for discipline or removal, 13.7.
Constitution, relationship of SPRL to, generally, 2.
Constitutional right to privacy, 2.4.
Constitutional rights, other, 2.5.
Constructive discharge effective before July 1, 1981, 10.2.2.
Constructive discharge, management service employees, 12.3.2.
“Constructive discharge/discipline,” 3.7, 10.2.2, 11.2.2, 12.3.2.
“Contrary to law,” ORS 240.086(1), 3.8.
Credibility rulings, 16.4.
Definitions generally, 3. (See other titles in this index for particular definitions.)
Denial of charges, 6.4.
Depositions, 7.1.
Discharge/discipline, constructive, 3.17a.
Discipline inconsistent with employer’s prior practice as an affirmative defense, 6.5.
Discipline, progressive, 3.17a.
Discrimination (sex, race, religion, handicap, age) as an affirmative defense, 6.6.

Dismissal, classified employees, on and after July 1, 1981, 11.2.1.
Dismissal, management service employees, 12.3.1, 12.3.8.
Dismissal effective before July 1, 1981, 10.2.1.
Dismissal of appeal for lack of prosecution/failure to pursue appeal, 5.2.5.
Document, falsification of, as cause for discipline or removal, 13.11.
Duty of good faith and fair dealing, 16.16.
Electronic systems, misuse of, 13.12a.
Email, misuse of, 13.12a.
Employer awareness of workplace problem as an affirmative defense, 4.3, 6.7.
Ethics issues as cause for discipline or removal, 13.13.
Equitable estoppel, 16.2.
Estoppel, 16.2.
Evidentiary and other rulings generally, 16.
Final decision, 3.24.
“For the good of the service,” ORS 240.316(4), 240.570(2), 3.9.
Fourteenth Amendment due process clause, 2.1, 4.1.
Good faith and fair dealing, duty of, 16.16.
Hearings generally, 8.
Hearing record, reopening, 9.1.
Implied resignation effective before July 1, 1981, 10.2.16.
“Implied resignation” /resignation, 3.10, 10.2.16.
“Inefficiency,” ORS 240.555, 3.11.
Information, withholding of, as cause for discipline or removal, 13.15.
“Insubordination,” ORS 240.555, 3.12.
Investigation, failure to cooperate, dishonesty in, as cause for discipline or removal, 13.17.
Issuance of personnel action and statement of charges generally, 4.
Jurisdiction of ERB generally, 1.
Jurisdiction under ORS 243.650 et seq., 1.8.
Language, inappropriate, as cause for discipline or removal, 13.18.
Leave without pay, unauthorized, as cause for discipline or removal, 13.19.
Legislative history, temporary employment, 16.14.
Make whole remedy, 15.1.
“Malfeasance,” ORS 240.555, 3.13a.
Management service employment (effective July 1981) generally, 12.
Management service, ERB jurisdiction, 1.3.
Management service employee conduct expectations, 12.2.
Mental condition as an affirmative defense, 6.11.
“Misconduct,” ORS 240.555, 3.14.
Misrepresentation as cause for discipline or removal, 13.20.
Motions, 8.6, 16.
Notice of expectations and deficiencies, 2.1, 4.1.
Notice of imposition of discipline not appealed, 16.7.
Off-duty conduct as cause for discipline or removal, 13.21.
Off-duty conduct not subject to discipline as an affirmative defense, 6.10.
ORS 240.555 and standard of review on and after July 1, 1981, 3.19, 11.1.
ORS 240.570 and standard of review for management service personnel actions, 3.19, 12.1.

Pay-line exception, 11.2.20.
Performance appraisal effective before July 1, 1981, 10.2.18.
Personnel actions, classified employees, on and after July 1, 1981, 11.2.
Personnel actions effective before July 1, 1981, generally, 10.2.
Personnel actions, management service generally, 12.3.
“Personnel action,” ORS 240.086(1), 3.16.
Physical condition as an affirmative defense, 6.11.
Pleading requirements, personnel action appeal to ERB, 5.2.3.
Pleading requirements, petition for review of arbitration award, 17.3.
“Political reasons,” ORS 240.560(3), 3.17.
Post-hearing briefs, 8.7.
Prehearing practice generally, 7.
Privacy, right to, 2.4.
Progressive discipline, 3.17a.
Property, failure to account for/safeguard as cause for discipline or removal, 13.22.
“Reasonable employer,” 3.19, 10.1, 11.1, 12.1.
Reassignment, management service employees, 12.3.13.
Record, reopening, 9.1.
Rescission and reimposition of personnel action, 4.5.
Reclassification, 3.24.
Record, reopening, 9.1.
“Red-lining,” 3.20.
Reduction in pay, classified employees, on and after July 1, 1981, 11.2.6.
Reduction in pay, management service employees, 12.3.10.
Regular employee, 3.24.
Relevance rulings, 16.9.
Remedies generally, 15.1.
Remedies, temporary employment, 18.4.
Removal from management service if unable or unwilling to perform (ORS 240.570(3)), 12.3.5.
Removal from management service “due to reorganization or lack of work” (ORS 240.570(2) nondisciplinary removal/layoff), 12.3.6.
Removal from management service with restoration to classified service, 12.3.7.
Reorganization, 3.24.
Reprimand, 3.20a.
Reprimand, management service employees, 12.3.11.
Resident abuse as cause for discipline or removal, 13.25.
Review by appellate courts, 9.3.
Review/enforcement of State employee arbitration awards generally, 17.
Scope of review, petition for review of arbitration award, 17.4.
Security, failure to provide proper, as cause for discipline or removal, 13.26.
Sex-related conduct as cause for discipline or removal, 13.27.
Sickness, absence/unsatisfactory performance due to, as cause for discipline or removal, 13.29.
Stay of order pending appellate court review, 9.2.
Subpoenas, 7.2.
“Substantial evidence,” ORS 183.482(8)(c), 3.21.
Suspension effective before July 1, 1981, 10.2.5.

Tardiness as cause for discipline or removal, 13.31.
Temporary service, ERB jurisdiction, 1.5.
Temporary employment generally, 18.
Terms and conditions generally, 3. (See other titles in this index for particular terms.)
Text messaging, misuse of, 13.12a.
Timeliness of personnel action appeal to ERB, 5.2.2.
Timeliness of temporary employment appeal, 18.1.
Timeliness of petition for review of arbitration award, 17.1.
Timeliness rulings, 5.2.2, 16.12.
“Unfitness to render effective service,” ORS 240.555, 3.22.
Unlawful order as an affirmative defense, 6.12.
Waiver of prosecution, failure to discipline in a timely manner, 4.3, 6.7.
Whistleblower statute, 6.13.
“Work now, grieve later” doctrine as an affirmative defense, 6.12.
“Work now, grieve later,” 3.23.
Work performance, loss of confidence in, as cause for discipline or removal, 13.34.
Work performance, unsatisfactory, as cause for discipline or removal, 13.35.
Workers Compensation Board Administrative Law Judges, 1.15, 19.1.