THE

STATE PERSONNEL RELATIONS LAW

DIGEST

SUPPLEMENT

January 1, 1993-December 31, 2008

State of Oregon
Employment Relations Board
528 Cottage Street, N.E.
Salem, Oregon 97310-3807

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The SPRL Digest Supplement 1993-2008

Introduction

This volume supplements *The State Personnel Relations Law Digest 1980-1992*, which was previously published by the Oregon Employment Relations Board. It also replaces the *1993-1996 Supplement*, the *1996-2000 Supplement*, and the *2001-2003 Supplement.* The entries in those supplements have been merged into this digest with the entries from the decisions issued in 2004-2008. This volume is intended to be a digest of all State Personnel Relations Law (SPRL) decisions rendered by the appellate courts and the Board from January 1, 1993 through December 31, 2008. However, it also includes entries for some decisions issued between 1980 and 1984, which were inadvertently not included in *The SPRL Digest 1980-1992*.

The SPRL, ORS 240.005 et seq., grants State of Oregon employees certain employment rights. The Employment Relations Board (ERB) reviews personnel action appeals and petitions filed by State employees. During the period covered by this supplement, ERB's prior members were Patrick Mosey (June 1980-November 1995), Allen Hein (July 1980-April 1997), Daniel Ellis (August 1980-June 1997), David W. Stiteler (April 1996-August 2003), Kathryn T. Whalen (May 1997-April 2003), Rita E. Thomas (August 1997-December 2003), Luella E. Nelson (September 2003-July 2004), James Kasameyer (September 2004-September 2007), and Donna Bennett (November 2005-February 2007), Vickie Cowan (June 2007-December 2011) and Paul B. Gamson (June 2003-June 2012). Current ERB members are Susan Rossiter (October 2007-) Kathryn Logan (March 2012-), and Jason Weyand (July 2012-).

The entries in each section of *The SPRL Digest* are arranged in reverse chronological order, with the most recent decisions listed first. We have noted where and when new classifications were added during the period covered by this volume.

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: (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

1.1 1 An inmate in a correctional institution filed an appeal concerning his dismissal from a position as a skilled cartographer in the prison industries program. The Board dismissed the appeal for lack of jurisdiction, holding that Appellant was not a "regular employee" as that term is defined in ORS 240.013(8) because he had not been *appointed* to a position which was part of the state classification system and had not completed a trial service period. The Board noted that it has jurisdiction only to hear appeals concerning personnel actions from regular employees. Hill v. Department of Corrections, Case No. MA-15-95 (October 1995).

1.1 2 Auditors appealed directly to the Board their placement in lower paying jobs. The agency moved to dismiss the appeal for the reason that Appellants had failed to exhaust the agency grievance procedure before appealing to the Board. The Board noted that, under its rules, some types of appeals must be processed through internal grievance procedures before an appeal is allowed but that other types of appeals, such as claims under OAR 115-45-015 about position allocations, could be brought directly to the Board. The Board dismissed the appeals on the merits, finding that the reallocation of Appellants' positions to lower-paying classifications was not arbitrary, contrary to law or rule, or taken for political reasons in violation of ORS 240.086(1). [NOTE: The Board revised OAR 115-45-015 after the date of this decision; the amended rule now requires exhaustion of agency grievance procedures before appeal.] Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

1.1 3 Classified service employee filed an appeal alleging that the agency improperly changed her employment status from regular permanent to limited duration. The Board noted that under the State Personnel Relations Law, it did not have jurisdiction over personnel action appeals from employees represented by an exclusive representative in a certified or recognized bargaining unit. After reviewing the undisputed facts, the Board concluded that Appellant was a member of a bargaining unit and dismissed the appeal. Loftus v. Board on Public Safety Standards and Training, Case No. MA-8-95 (July 1995).

1.1 4 Academic degree administrator, a classified employee, received a letter his supervisor sent to the government standards and practices commission in which the supervisor criticized a complaint Appellant filed with the commission. Appellant appealed the issuance of the letter as a personnel action against him within the meaning of ORS 240.086. The Board dismissed the appeal, finding that no personnel action had been taken against Appellant because he was not adversely affected in any way by the letter. The Board also dismissed the appeal for lack of prosecution. Young v. Office of Educational Policy and Planning, Case No. MA-22-94 (September 1994).

1.1 5 Classified employee was reduced in pay by one grade for six months. The Board dismissed the appeal as untimely under ORS 240.560(1) and OAR 115-45-010(1) because it had not been filed with the Board within 10 days of the effective date of the pay reduction. The Board, citing *Phillips v. Worker's Compensation Department,* Case No. 1463 (1984), rejected Appellant's argument that the appeal was timely because she had notified her *employer* within 10 days that she was wished to appeal her pay reduction to the Board. Wilson v. Oregon State Police, Case No. MA-4-94 (May 1994).

1.2 Classified employees included in bargaining unit

1.2 1 An employee in a classified position 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). Abrego v. Department of Human Services, Case No. MA-14-07 (October 2007).

1.2 2 A classified employee represented by AFSCME appealed removal from trial service. The parties' collective bargaining agreement provided that trial service removals were not subject to the contract's dispute resolution process. Citing *Thorson v. Department of Human Services*, Case No. MA-15-04 (February 2005), the Board dismissed the appeal for lack of jurisdiction because 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. Deglow v. Real Estate Agency, Case No. MA-9-06 (November 2006).

1.2 3 An office specialist, who was a member of an SEIU represented bargaining unit, appealed her removal from trial service under the SPRL because the SEIU/State collective bargaining agreement provided that trial service removals were not subject to the grievance procedure. The Board dismissed the appeal for lack of jurisdiction stating that it does not have authority under ORS 240.086 to review personnel actions affecting an employee who is a member of a certified or recognized bargaining unit. Thorson v. Department of Human Services, Medford Child Welfare Office, Case No. MA-15-04 (February 2005).

1.2 4 A classified employee, who had recently become represented by SEIU, appealed his dismissal under SPRL because SEIU and the State had agreed to a grievance procedure which took effect 5 days after his termination. The Board dismissed the appeal for lack of jurisdiction, stating that under ORS 240.086(1) it only has authority to review "any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit." The Board noted that in *Oregon AFSCME Council 75, AFL-CIO, and Tender v. State of Oregon, Department of Environmental Quality*, Case No. UP-131-86, 10 PECBR 287 (1987), it had found that the State violated ORS 243.672(1)(e) because the State changed the *status quo* established by the SPRL when it dismissed an employee in similar circumstances to the appellant. Manion v. Department of Fish and Wildlife, Case No. MA-26-03 (June 2004), AWOP, 201 Or App 589, 121 P3d 23 (2005).

1.2 5 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 her dismissal. The 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. Parra v. Fish and Wildlife Department, Case No. MA-24-03 (November 2003).

1.2 6 The Board ruled that it did not have jurisdiction to consider reallocation appeals filed by employees included in a bargaining unit. Respondent reallocated classified employees from program tech 2 to program tech 1 classifications *after* AFSCME became exclusive representative of a bargaining unit that included Appellants and *before* AFSCME and the State signed their initial

collective bargaining agreement. After quoting ORS 240.086(1) and 240.321(2) and its decision in *Demaray v. DEQ*, Case No. MA-14-86 (January 1987), the Board stated: "[E]ven though a collective bargaining agreement had not been executed at the time the position reallocations took place, such actions occurring after an exclusive representative has been certified are not subject to Board review under ORS 240.086(1). Said another way, a State employee who is included in a bargaining unit cannot pursue an appeal of a personnel action under the SPRL." In explaining its decision, the Board also cited *Tedder and AFSCME Council 75 v. DEQ*, Case No. UP-131-86, 10 PECBR 287 (1987). Coyle and Busam v. State Police Department Office of Emergency Management, Case No. MA-11-97 (July 1998).

1.2 7 Classified employees, included in a bargaining unit represented by AFSCME, appealed the Department's refusal to reclassify or promote them. The Board quoted ORS 240.086(1), which provides that the Board has jurisdiction to review personnel actions of an employee "who is not in a certified or recognized appropriate collective bargaining unit." In addition, the Board quoted from its decision in *OPEU Petition for a Declaratory Ruling*, Case No. 1279 (June 1981), in which it had ruled that the Board has no jurisdiction to decide appeals filed by represented employees. The Board dismissed the appeal for lack of jurisdiction. Hathaway and Gilliland v. Corrections Department, Case Nos. MA-5/7-97 (February 1998).

1.2 8 Classified service employee filed an appeal concerning the change in her employment status from regular permanent to limited duration. The Board found that the agency's employees, including Appellant, had become represented by a labor organization about a year and a half earlier, and that Appellant had filed a grievance over the employment status change under the collective bargaining agreement. Citing ORS 240.086(1), the Board held that it had no jurisdiction to review Appellant's claim because she was in a certified collective bargaining unit. Loftus v. Board on Public Safety Standards and Training, Case No. MA-8-95 (July 1995).

1.2 9 The Board dismissed the appeal and Appellant's request for reconsideration of the dismissal on the basis that the action being appealed occurred in December 1981 and the Board's jurisdiction under the SPRL over bargaining unit employees ended on June 30, 1981. Eaton v. Department of Transportation, Case No. 1378 (November 1981).

1.2 10 Appellant challenged his classification by the State as "representable" rather than excluded from representation under the collective bargaining law. The Board dismissed the appeal, concluding that it had no jurisdiction under Chapter 240 to review the State's action. O'Brien v. Department of Commerce and Executive Department, Case No. 1111 (July 1980).

1.3 Management service

1.3 1 The State's dismissal letter of a management service employee failed to expressly remove the appellant from management service. The Board held that such removal was inherent in the appellant's dismissal from classified service and it would not require that the grounds for the removal from management service and dismissal from classified service be separately stated. However, the Board must address both issues. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

1.3 2 A management services employee filed an appeal alleging that the State had unlawfully reclassified him from an executive manager B to an executive manager C. The Board dismissed the appeal for lack of jurisdiction since reclassifications and reallocations are not among the categories of personnel actions listed under ORS 240.570(4) that management service employees may appeal to the Board citing *Herron v. Department of Corrections*, Case No. MA-10-03 (November 2003) and other cases. Rieke v. Department of Human Services, Office of Human Resources, Case No. MA-2-06 (August 2006).

1.3 3 A management service employee appealed the State's denial of a hardship transfer request. Citing *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998) and *Herron v. Department of Corrections*, Case No. MA-20-03 (November 2003), the Board dismissed the appeal for lack of jurisdiction since the denial of a transfer is not among the categories of personnel actions listed under ORS 240.570(4) that management service employees may appeal to the Board. Turner v. Department of Corrections, Case No. MA-12-05 (July 2006).

1.3 4 A management service employee appealed removal from management service and reinstatement to classified service during her trial service period . The Board rejected the appellant's argument that state policies overruled prior Board case law and provided appeal rights for management service employees. Citing to *Taylor v. State of Oregon, Department of Corrections*, Case No. MA-4-00 (May 2000), the Board held that it has no authority to review appeals of management service removals during trial service periods under ORS 240.570(3). Jackson-Graves v. Department of Justice, Division of Child Support, Case No. MA-11-05 (January 2006).

1.3 5 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

1.3 6 Appellant filed an appeal over her removal from management service. The Board first rejected the State's assertion that the Board lacked jurisdiction because the appellant was an executive service employee. The Board then considered whether appellant fell within management service. Under ORS 240.212, management service comprises all positions that are neither unclassified nor exempt, and that are either confidential, supervisory, or managerial as defined in ORS 243.650. The Board held that because appellant directly and indirectly supervised over 200 employees; planned,

assigned, and approved work; responded to grievances; disciplined and rewarded employees; hired and fired; and prepared and signed performance appraisals, her duties clearly qualified her as a supervisory employee under ORS 243.650(23), and therefore a member of the management service. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

1.3 7 A management service employee filed an appeal alleging that the State had wrongfully failed to reclassify his position. The Board dismissed the appeal for lack of jurisdiction citing to *Herron v. Department of Corrections*, Case No. MA-20-03 (November 2003) in which it held that reclassification and reallocation are not among the categories of personnel actions which management service employees are entitled to appeal under ORS 240.570(4). Nelson v. Employment Department, Office of Human Resources, Case No. MA-8-05 (September 2005).

1.3 8 A management service employee filed an appeal alleging that the State had violated a hiring agreement under which he was to receive a wage increase after one year of employment. The Board dismissed the appeal for lack of jurisdiction, citing, *Mitchell v. Teacher's Standards and Practices Commission*, Case No. MA-8-89 (August 1989), in which the Board held that an agency's failure to pay a salary increase promised to a management service employee when he had been hired was not subject to appeal under ORS 240.570(3). The Board also dismissed the appeal for lack of prosecution because the appellant failed to respond to the ALJ's dismissal warning, citing *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Savage v. Department of Transportation, Case No. MA-38-03 (February 2004).

1.3 9 A management service correctional lieutenant appealed his reclassification to a classified service sergeant position, represented by a labor organization. The Board granted the State's motion to dismiss for lack of jurisdiction, stating that reclassification and reallocation actions "are not among the specific categories of personnel actions which ORS 240.570(4) provides that a management service employee may appeal to this Board." Herron v. Corrections Department, Case No. MA-20-03 (November 2003).

1.3 10 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals. The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting.

1.3 11 Safety Specialist 1, in the management service, appealed the State's alleged addition of a significant number of duties from the Safety Specialist 2 classification to his position's

responsibilities. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction to decide classification issues involving management service employees, as previously determined in *Jester v. Corrections Department*, Case No. MA-9-00 (October 2000). The Board reviewed ORS 240.570(2) and (3), which limit management service employees' appeal rights, reaffirmed *Jester*, and dismissed the appeal. Liepins v. Oregon State Hospital, Case No. MA-14-02 (December 2002).

1.3 12 Principal executive/manager C, in the management service, appealed her classification to PE/M B. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction to decide classification issues involving management service employees, as previously determined in *Jester v. Corrections Department*, Case No. MA-9-00 (October 2000). The Board reviewed ORS 240.570(2) and (3), which limit management service employees' appeal rights, reaffirmed *Jester*, and dismissed the appeal. Mendenhall v. Oregon State Hospital, Case No. MA-27-02 (December 2002).

1.3 13 Principal executive/manager G (in the unclassified service, according to the State) appealed his reassignment or reallocation to PE/M F. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction over unclassified service employees or over those issues, even if Appellant were in the management service. The Board cited statutes and rules that apply to management service appeals and dismissed Appellant's unclassified service reassignment appeal as untimely and his reclassification appeal as outside of the Board's jurisdiction. Aguirre v. Human Services Department, Case No. MA-25-02 (December 2002).

1.3 14 Senior Internal Auditor 2, in the management service, was reprimanded and appealed, alleging violation of ORS 240.570(3). The Board denied the State's motion to dismiss the management service reprimand appeal on jurisdictional grounds, citing *Carter v. Corrections Department*, Case No. MA-12-99 (September 2001). After analyzing the record, the Board concluded that the State had proved two of the four charges that Appellant's conduct reflected that he was unable or unwilling to meet the standards that apply to a senior auditor. The Board stated that "a reprimand is one of the mildest forms of discipline. 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." The Board concluded that, under the circumstances, "the Department's reprimand of [Appellant] was not an excessive form of discipline and was objectively reasonable." Hill v. Transportation Department, Case No. MA-7-02 (November 2002).

1.3 15 The Board held that it has jurisdiction to review a management service employee's appeal of a reprimand. The State asserted that, under ORS 240.570(4), management service employees are entitled to appeal only the forms of discipline listed in ORS 240.560: reduction, dismissal, suspension, or demotion. The Board reasoned: "The appeal rights granted to management service employees by ORS 240.570(4) encompass discipline—one form of which is a reprimand—specifically listed in ORS 240.570(3). The explicit reference to ORS 240.560, relied upon by the State, refers to the *manner* of appeal, i.e., the way it is to be done. This language does not limit which actions may be appealed." Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

1.3 16 *Management service removal appeal*. (See companion entries in sections 5.2.2, 11.2.1, and 16.2) On further review, the Board held that it did not have jurisdiction to consider either "Appellant's dismissal from classified service or her plea for reinstatement" to her management service position. After noting that Appellant's classified termination appeal was untimely and therefore dismissed, the Board stated that "dismissal of that appeal necessitates dismissal of her management service removal appeal as well." The Board observed that management service and classified service are both categories of state service and that management employees have fewer SPRL rights than classified employees. The Board then stated: "As it is a category of state service, it is axiomatic that continued employment in management service requires continued employment as a state employee. Said differently, there is no management service status independent of state employment. A management service employee with prior classified service does not have separate status as a management service employee and a state employee. The employee's management service status is merely a part of the employee's overall identity as a state employee. Once state employment has been terminated, there is no independent right to continue in management service. Neither is there an independent right to be restored to management service, absent the right to be restored to classified service." The Board stated that Appellant's right to appeal her management service removal was "interdependent" on her right to appeal her classified service dismissal. Finally, the Board stated that, even if Appellant still had a right to appeal her management service removal, "there would be no effective remedy that this Board could order." The Board reasoned: "In order to be restored to management service, Appellant must be in the classified service, a state employee. When her state employment was terminated (and her [classified service] appeal right was lost [due to being untimely]), her restoration right was lost as well. This essentially renders the appeal moot." Smith v. Transportation Department, Case No. MA-2-98, appeal remanded (April 1998), appeal dismissed (October 1998), Member Whalen dissenting, AWOP, 166 Or App 238, 999 P2d 563 (2000).

1.3 17 Jail inspector was reallocated from management service to a classified service position as program technician 2, and he appealed. The Board dismissed the appeal, ruling that it did not have jurisdiction over that type of management service employee personnel action. The Board noted that ORS 240.240 provides that management service personnel are not subject to the SPRL, with limited exceptions, and that they have the right, under ORS 240.570(2) and (3), to appeal only six types of personnel actions: assignment; reassignment; transfer for the good of the service; removal from management service due to reorganization or lack of work; discipline; and removal from management service if unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. The Board observed that "[a] reclassification or reallocation decision regarding a management service employee does not involve a determination of employee 'fault' or any question of the validity of a reorganization or claim of a lack of work. Instead, it may be a technical decision involving a comparison of work performed and the duties and responsibilities of a particular classification." The Board concluded that Respondent did not discipline or remove Appellant from management service (due either to reorganization or performance issues), and stated that the appeal did not allege that Respondent's action amounted to an appealable assignment, reassignment, or transfer. Jester v. Corrections Department, Case No. MA-9-00 (October 2000).

1.3 18 Management service employee's resignation from State employment, in lieu of accepting return to classified service, precluded the Board from asserting jurisdiction over the employee's later appeal of his removal, the Board ruled. The Board found that, on December 3, 1999, the State removed Appellant from management service and returned him to classified service, effective

January 1, 2000; on December 27, 1999, he submitted a resignation effective December 31, 1999; and on January 10, 2000, he filed an appeal, in which he asserted that he did not resign his position in the management service but was effectively terminated. The Board stated that, when Appellant resigned from his management service position, he resigned from State employment, had no right to State employment, and did not have the right to assert that his removal and restoration violated ORS 240.570(1) or (3). (In its decision, the Board cited and quoted *Smith v. Transportation Department*, Case No. MA-2-98 (April 1998), in which the Board dismissed a classified employee's termination appeal and remanded a management service removal appeal but later (October 1998) dismissed the management service removal appeal, Member Whalen dissenting; AWOP 166 Or App 238, 999 P2d 563 (2000).) Humphreys v. Forestry Department, Case No. MA-1-00 (May 2000).

1.3 19 While on trial service, the State removed Appellant from management service, and he appealed. The Board dismissed the appeal, citing *Executive Department Declaratory Ruling*, Case No. DR-8-85, 8 PECBR 8271 (1985), in which the Board stated that it "has no authority to review appeals from Management Service employees who are removed from a trial service period which has been established pursuant to rules of the Division under ORS 240.250." Taylor v. Corrections Department, Case No. MA-4-00 (May 2000).

1.3 20 The Board dismissed for lack of jurisdiction the appeal of a letter of expectations filed by a personnel officer in the management service, stating that such action is not reviewable under ORS 240.570(3) and Board Rule 115-45-023 and that the reasoning in *Morris v. Department of General Services*, Case No. MA-8-91 (September 1991) (no jurisdiction over management service employee's performance appraisal appeal) was applicable. Since it had no jurisdiction over issuance of the letter, the Board stated that it had no jurisdiction to reach Appellant's request to order the employer to remove a reference to a withdrawn letter of reprimand that was contained in the letter of expectations. Burleigh v. Department of Transportation, Case No. MA-16-96 (June 1996).

1.3 21 Nurse manager appealed her removal from management service and the agency's refusal to allow her to work at home, arguing that the removal was arbitrary because it violated the provisions of the Americans with Disabilities Act, ORS 243.305 or ORS 659.426, statutes relating to the employment of the disabled. The Board held that it has no authority to consider discrimination claims arising under other statutes, and thus had no jurisdiction to decide whether Appellant's removal violated those statutes. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

1.3 22 Management service employee was denied a promotion to Correctional Captain and appealed the denial to the Board. The Board ruled that under ORS 240.570 management service employees have the right to appeal only removal from management service, assignment, reassignment, transfer, and discipline. Because denial of a promotion is not an appealable personnel action for management service employees, the Board dismissed the appeal for lack of subject matter jurisdiction. Herron v. Eastern Oregon Correctional Institution, Case No. MA-5-95 (June 1995).

1.3 23 Correctional food service manager, in the management service, was demoted to a position in the classified service. The Board dismissed the appeal of her demotion under OAR 115-45-023(2) as untimely because it was filed more than 15 days from the date on which she received the final decision of the agency head. Appellant had filed her appeal with the wrong agency and was never notified of her error until after the deadline for filing with the Board had passed. The Board noted

that the deadlines for filing under the SPRL are jurisdictional, and have always been strictly applied. Nelson v. Department of Corrections, Case No. MA-36-94 (January 1995).

1.3 24 Appellant was removed from his management service position and placed in a classified service position in response to an order by the Governor to reduce the number of State employees. Finding that ORS 240.570 was "silent" as to the Board's authority to review such removals, the Board applied ORS 240.086(1) and set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons." The Board found that the agency had not followed its own policy in selecting employees for layoff and removing Appellant from management service. The court of appeals reversed, holding that ORS 240.570(4), which provides that management service employees may appeal assignments, reassignments, transfers and removals to this Board "in the manner provided by ORS 240.560," was the only part of Chapter 240 which made review by the Board applicable to management service employees. The court of appeals concluded that these laws did not give the Board authority to set aside or modify a personnel action for violation of a personnel rule. The case was remanded to the Board to determine whether the Appellant was laid off in violation of ORS 240.560. On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded, 129 Or App 565 (1994), order after remand, (November 1994).

1.3 25 Supervising accountant was removed from her management service position for disciplinary reasons. OAR 115-45-023(2) requires a management service employee who is appealing discipline or removal from management service to file a written appeal with the Board within 15 days after receiving the final decision of the agency head. The Board dismissed the appeal as untimely because it was not filed until after the 15 day time limit had passed. The Board found that the late filing was not excused by the agency's failure to tell her about the deadline for filing her appeal, or the agency's failure to send a copy of the removal letter to Appellant's lawyer. Citing several prior cases, the Board reaffirmed that it considers the filing deadlines to be jurisdictional. Shepard-Lamb v. Adult and Family Services Division, Case No. MA-29-94 (October 1994).

1.3 26 Systems and programming supervisor appealed his nondisciplinary removal from management service and a change in his work schedule. The Board dismissed the appeal as untimely under OAR 115-45-023(2), which required that appeals be filed within 15 days of receiving a response from the Executive Department Director. The Board rejected Appellant's argument that his appeal was timely because he had relied on a rule provided by the agency which did not specify that appeals had to be received by the Board within the time limit. The Board noted that agency policy could not be used to extend the time limit contained in Board rules. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

1.3 27 The Board dismissed an appeal for lack of jurisdiction concerning the denial of a pay increase to a campus service supervisor in the management service. The Board noted that management service employees have the right to appeal only reprimands, salary reductions, suspensions, demotions and removal from management service under ORS 240.570(3), (4) and (5), and denial of a salary increase did not fit in any of the listed categories. Hopkins v. Mental Health and

Developmental Disability Services Division, Fairview Training Center, Case Nos. MA-6/23-92 (July 1993).

1.3 28 Contracts officer in the management service appealed the reclassification of his position. The Board dismissed the appeal for lack of jurisdiction, holding that ORS 240.570 gave it no authority to review non-disciplinary matters other than assignment, reassignment, transfer or removal involving management service employees. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

1.3 29 The Board dismissed a management service employee's appeal of an agency's refusal to reclassify her position where it was filed more than 15 days after Appellant received a final decision from the Executive Department concerning a grievance about her reclassification and therefore the appeal was not timely filed under OAR 115-45-023(2). The Board rejected Appellant's argument that the Agency's grievance procedure indicated the Agency had impliedly waived this deadline. In a footnote, the Board explained that the appeal would have been dismissed on the merits even if timely because the Board has no authority to hear appeals of management service reclassification, assignment or reassignment decisions. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

1.4 Unclassified service

1.4 1 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

1.4 2 Appellant filed an appeal over removal from management service. The State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. This Board lacks jurisdiction over appeals of executive service employees. See ORS 240.240 and 240.245; *Hanf v. Office of State Fire Marshall*, Case No. MA-21-96 (November 1996); and *Hunt v. Department of State Police*, Case No. MA-4-89 (June 1989). The Board first held that the State was not equitably estopped from making this assertion because the issue of whether appellant is an executive service employee is a conclusion of law. The Board then determined that the State had failed to prove that the appellant was an executive service employee within the meaning of ORS 240.205(4) and OAR

105-10-000(24), because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute and it could not speculate that the DAS director has given approval because the Board's review is confined to the factual record. The Board then ruled that the appellant was a management service employee because her duties qualified her as a supervisory employee under ORS 243.650(23). Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

1.4 3 Principal executive/manager G (in the unclassified service, according to the State) appealed his reassignment or reallocation to PE/M F. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction over unclassified service employees or over those issues, even if Appellant were in the management service. The Board cited statutes and rules that apply to management service appeals and dismissed Appellant's unclassified service reassignment appeal as untimely and his reclassification appeal as outside of the Board's jurisdiction. Aguirre v. Human Services Department, Case No. MA-25-02 (December 2002).

1.4 4 Chief deputy fire marshal appealed his termination and did not dispute that he was in the unclassified service established in ORS 240.205(4). The Board dismissed the appeal, citing ORS 240.240, which provides that the SPRL does not apply to unclassified personnel. Hanf v. Fire Marshal, Case No. MA-21-96 (November 1996).

1.5 Temporary service (see also chapter 18)

1.5 1 Testimony about the meaning of the temporary employment statute, ORS 240.309, from former legislators and a former union political director was properly excluded by the ALJ, the Board ruled. The Board stated: "If a statute is not clear on its face, the best evidence of legislative history is the legislative record: recorded testimony, various reports, and meeting minutes. After-the-fact testimony from legislators or legislative witnesses about what they meant by certain legislation is not useful in determining the intent of the legislature as a whole." Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002). See also Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002).

1.5 2 Temporary employee—employed in a temporary position from September 14, 1999 to July 21, 2000—filed a complaint on August 1, 2000, alleging that his temporary employment exceeded six months, in violation of ORS 240.309. The State asserted that the complaint was untimely under Board Rule 115-45-017(2), which provided: "The complaint must be filed with the Board no later than 30 days after the employee knew or should have known of the action being appealed." After reviewing the rule in the context of ORS 240.307 and *Huff v. Great Western Seed Co.*, 322 Or 457, 461 n. 3 (1996), the Board concluded that the rule was invalid. In addition, the Board stated that "[b]ecause ORS 240.307 does not contain a discovery rule ["knew or should have known of the action"], it was improper for this Board to enact a rule that included one. Where we find that an administrative rule is not in accordance with the statute, we are obliged to defer to the statute." Accordingly, the Board did not apply the rule and used the approach from *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000): the 30-day time period for a complaint alleging a violation of ORS 240.309 begins on the temporary employee's termination date. Under that approach, the Board ruled that Complainant's appeal was timely. Goetz

v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

1.5 3 Temporary employee's employment ended December 30, 1996. In an appeal filed February 28, 1997, she alleged that the termination was unfair. Board Rule 115-45-017 provided, at that time, that appeals claiming a violation of the temporary employment statute, ORS 240.309, must be filed "no later than 30 days after the employee knew or should have known of the action being appealed." The Board dismissed Appellant's appeal as untimely, observing that, to be timely, it should have been filed no later than January 29, 1997. (The Board also observed that a conflict existed between temporary employee appeal rules adopted by the Board and by DAS, but the Board noted that the conflict did not affect Appellant's appeal.) Cole v. Department of Administrative Services, Case No. MA-3-97 (March 1997).

1.5 4 Temporary employee's failure to respond to the ALJ resulted in dismissal of the appeal; the Board cited *Kirsch v. PUC*, Case No. MA-14-94 (September 1994) (failure to respond to ALJ amounted to lack of prosecution and warrants dismissal). The ALJ had sent Appellant information provided by the agency about its position. The agency asserted that it had the authority to extend Appellant's temporary employment, made the extension, and employed Appellant to replace employees on leave. Under those circumstances, the Board dismissed the appeal, citing *Trotts v. Oregon State Hospital*, Case No. MA-9-95 (October 1995). Trombley v. EOTC, Case No. MA-20-96 (October 1996).

1.5 5 The Board dismissed as untimely an appeal of a temporary employee who alleged that he had been denied permanent employment in violation of ORS 240.309. The Board noted that in order to obtain review under OAR 115-45-017, as the rule regarding temporary appointments was phrased at the time, a complainant had to file the appeal with the Board "[n]o later than 15 days after receipt by the employee of the final decision of the Agency Head." The Board concluded that the "final decision" referred to in this rule was the agency head's decision to allow the temporary employment to end. Because Appellant filed his appeal with the Board more than 15 days after his temporary employment ended, the Board ruled his appeal untimely. Gibson v. Eastern Oregon Psychiatric Center, Training Center, and Support Services, Case No. MA-14-95 (October 1995).

1.5 6 The Board dismissed a temporary employee's appeal of his termination from the classified service. Finding that Appellant had repeatedly failed to respond to the ALJ's requests for information, the Board dismissed the appeal for want of prosecution. Citing *Martin v. Oregon State Fair*, Case No. MA-13-90 (June 1991) and *Smith v. Fairview Training Center*, Case No. MA-22-93 (February 1994), the Board also dismissed the appeal because Appellant was a temporary employee and had no right to appeal his dismissal. Bassetti v. Children's Services Division, Case No. MA-31-94 (November 1994).

1.5 7 The Board dismissed a temporary employee's appeal of his dismissal from the classified service. The Board found that Appellant had not alleged facts, which proven, would be sufficient to show a violation of the temporary appointment statute, ORS 240.309. The Board also noted that because Appellant was a temporary employee, he was not entitled to review under either ORS 240.560 or 240.086, which apply to regular employees only. Smith v. Fairview Training Center, Case No. MA-22-93 (February 1994).

1.5 8 *Relationship of the Board's SPRL and Public Employee Collective Bargaining Act jurisdiction over temporary employee issues.* Deciding an unfair labor practice complaint under the PECBA, the Board held that the State violated ORS 243.672(1)(g) by refusing to arbitrate a grievance. The State employed the grievant as a temporary employee from July 1982 to July 1983, July 1983 to July 1984, and July 1984 to November 1984, when he was appointed to a regular position. In January 1985, OPEU asserted that grievant became a regular employee, in its bargaining unit, after he completed one year of temporary service (in July 1983) and that he was entitled to benefits retroactive to that date. The Board rejected the State's arguments, determined that the grievance was arguably arbitrable, and ordered the State to arbitrate. After discussing some aspects of the legislative history of ORS 240, the Board stated that it "has no exclusive jurisdiction over the construction and application of the statutes and rules governing temporary employee appointments." (9 PECBR at 9212.) The Board stated that it did not assert jurisdiction as a bar to arbitration of the dispute and that "[i]f an arbitration award is rendered, the Board shall have oversight of any interpretation or application of personnel law and rule made by the arbitrator, upon exceptions of either party under ORS 240.088. If it is shown to be contrary to law, the Board may take appropriate corrective action." OPEU v. Executive Department, Labor Relations Division, Case No. UP-3-86, 9 PECBR 9201 (1986).

1.8 ERB jurisdiction under ORS 243.650 et seq.

1.8 1 A classified employee, who had recently become represented by SEIU, appealed his dismissal under SPRL because SEIU and the State had agreed to a grievance procedure which took effect 5 days after his termination. The Board dismissed the appeal for lack of jurisdiction, stating that under ORS 240.086(1) it only has authority to review "any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit." The Board noted that in *Oregon AFSCME Council 75, AFL-CIO, and Tender v. State of Oregon, Department of Environmental Quality*, Case No. UP-131-86, 10 PECBR 287 (1987), it had found that the State violated ORS 243.672(1)(e) because the State changed the *status quo* established by the SPRL when it dismissed an employee in similar circumstances to the appellant. Manion v. Department of Fish and Wildlife, Case No. MA-26-03 (June 2004), AWOP, 201 Or App 589, 121 P3d 23 (2005).

1.8 2 Appellant appealed his classification by the State as "representable," (not excluded from representation under the collective bargaining law). The Board dismissed his appeal of this decision, finding that the State's action was not appealable under Chapter 243. O'Brien v. Department of Commerce and Executive Department, Case No. 1111 (July 1980).

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

1.9 1 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce

such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

1.9 2 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

1.9 3 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. The State, asserting the Public Records Law, moved to seal portions of the record involving testimony about discipline imposed on another State employee. After reviewing precedents, the Board ruled that the ALJ had acted within his discretion in entering a protective order; the Board quoted that order in its decision. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

1.9 4 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

1.9 5 The Board dismissed a petition alleging that Appellant had been denied benefits under ORS 243.230(5), 243.265, and 243.270 (statutes concerning health insurance benefits). The Board held that it had no jurisdiction to review Appellant's claim. Rivers v. Adult and Family Services Division, Case No. 1334 (July 1981).

1.11 Oregon State System of Higher Education employees (classification new in 1996; includes only cases after that date)

1.11 1 A management service employee, who worked for the Oregon University System (OUS), appealed his reassignment. The Board dismissed the appeal for lack of jurisdiction citing to ORS 351.086(1), in which the legislature had removed OUS employees from coverage under the SPRL. The Board also ruled that the appellant's citation to Article I, Sections 10, 20, and 33 of the Oregon Constitution, without explanation of their relevance, provided no basis to bar dismissal of the appeal. Slinker v. Oregon University System, Oregon Institute of Technology, Case No MA-15-07 (December 2007).

1.11 2 The Board held that Oregon State System of Higher Education employees are not within the Board's SPRL jurisdiction, after enactment of 1995 Or Laws, chapter 612 (codified in part at ORS 351.086). Huntley v. OIT, Case No. MA-19-96 (January 1997).

1.12 Oregon Health Sciences University employees (classification new in 1996; includes only cases after that date)

1.12 1 OHSU management service employee appealed her termination. The Board noted that ORS 353.100 provides that the provisions of ORS chapter 240 do not apply to OHSU and dismissed the appeal. Hall v. OHSU, Case No. MA-2-97 (April 1997).

1.13 Public Utility Commission positions transferred to DOT (classification new in 1996; includes only cases after that date)

1.13 1 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

1.14 Review of arbitration awards (classification new in 1996; includes only cases after that date)

1.14 1 In a petition for review of an arbitrator's award, the Board denied the State's motion to stay the arbitrator's reimbursement remedy pending the outcome of its petition for review. The Board held that it does not have statutory authority under ORS 240.086(2) to enjoin enforcement of arbitration awards. Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA) v. SEIU, Local 503, Case No. AR-1-05, 21 PECBR 307 (April 2006).

1.14 2 The Board noted that cases seeking review of arbitration awards come to the Board in two ways, either through the PECBA or under ORS 240.086(2), and that the same standard of review applies to both types of cases, citing *Executive Department v. Federation of Oregon Parole and Probation Officers*, Case No. AR-1-85, 9 PECBR 8497 (1986); and *Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 858 (1992). Office of Services for Children and Families v. SEIU Local 503, AR-3/4-03, 20 PECBR 829 (February 2005).

1.14 3 The Court of Appeals dismissed the appeal of a Board decision as moot and vacated the Board's order. The Board had ruled that an arbitrator's "interim award" (a procedural ruling) is not subject to the Board's discretionary review, under ORS 240.086(2). The Board found that a state police officer engaged in certain conduct; the State terminated the officer; prosecutors filed criminal charges against him in circuit court; the judge dismissed two of the charges; and the district attorney appealed to the court of appeals. The Association processed a grievance to arbitration and requested the arbitrator to postpone the hearing, to preserve the officer's Fifth Amendment rights, pending resolution of the criminal case; the State opposed that motion. The arbitrator convened a hearing and heard all offered testimony, except that from the officer. After the officer agreed to two conditions for a stay of the hearing (terms regarding back pay and reinstatement), the arbitrator adjourned the hearing, with certain provisos. In its discussion, first, the Board rejected the Association's argument that the Board has jurisdiction to review only "final" awards, concluding that it has the authority to review nonfinal awards but deciding to "exercise our discretion to decline to review interim rulings or awards, except in rare or unusual circumstances not present in this case." Second, the Board rejected the State's contention that the arbitrator exceeded his authority by ordering a stay that would result in a potentially-long delay that, the State asserted, would make the arbitrator unable to render a valid award: "Given the existence of a record in the arbitration hearing, we reject this State argument." Third, the Board stated that the arbitrator "narrowly and rationally limited the duration of the adjournment * * * [and] imposed conditions to minimize potential harm to the State resulting from the delay." As a result, the Board concluded that the circumstances did not warrant an assertion of jurisdiction and review of the arbitrator's interim ruling. (In footnote 2, the Board also noted that ORS 243.706(3)(c) of the PECBA provides that an arbitrator may adjourn hearings "from day to day, or for a longer time * * *.") State Police Department and Department of Administrative Services v. OSPOA, Case No. AR-2-00 (July 2000), 18 PECBR 711, recons (November 2000), *appeal dismissed as moot and Board order vacated (December 2002).*

1.14 4 ORS 240.086 does not grant the Board jurisdiction to review interest arbitration awards rendered under ORS 243.742-.752, the Board ruled. The Board stated that "[t]he proper mechanism for review of [interest arbitration] awards is through the [Public Employee Collective Bargaining Act], specifically ORS 243.752 and ORS 243.672(1)(f)." State Police Department and Administrative Services Department v. OSPOA, Case No. AR-3-00/UP-30-00, 18 PECBR 771 (October 2000).

1.15 Workers' Compensation Board Administrative Law Judges (classification new in 2001; includes only cases after that date)

1.15 1 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3) and Respondent's denial of his request for leave without pay. The Board ruled that it did not have jurisdiction to review whether the leave without pay denial violated ORS 240.086(1), citing *Payne v. Department of*

Commerce, 61 Or App 165, 174 (1982), *recons* 62 Or App 433, *rev den* 295 Or 841 (1983), *cert den* 470 US 1083 (1985) and *Knutzen v. Department of Insurance and Finance*, 129 Or App 565 (1994). Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

1.15 2 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

Chapter 2—Relationship to Constitution

2.1 Fourteenth Amendment due process clause (see also 4.1)

2.1 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service. The Board found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board ultimately concluded that the State acted reasonably when it dismissed the appellant. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

2.1 2 In the appeal of a management service emp1oyee's removal from management service, the Board set aside the removal in part because of the lack of process provided to the appellant, who never had an opportunity to respond to the allegations against him before discipline was imposed. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

2.1 3 In the appeal of a management service employee's removal and dismissal from classified service, the Board stated that a classified employee is entitled to the following procedural safeguards prior to being dismissed: notification of the charges against the employee, notification of the kind of sanctions being considered, and an informal opportunity to refute the charges, either orally or in writing, before the decision is made citing *Tupper v. Fairview Hospital*, 276 Or 657, 665, 556 P2d 1340 (1976). The State is not required to take the additional step of interviewing the employee during its investigation to satisfy due process. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

2.1 4 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals.

The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting. See also the following entry.

2.1 5 Child welfare human services manager appealed the termination of her employment effective October 28, 2002. Appellant mailed her appeal to the Board on November 5, and the Board received it on November 12. ORS 240.560(1) (classified service employees) and 240.570(5) (management service employees, by reference) provide that a dismissal appeal may be filed "not later than *10 days* after the effective date of" the dismissal. The State moved to dismiss the appeal as untimely. The Board stated that it strictly applies the ten-day filing rule; its policy not to excuse late filings for "good cause" does not violate due process guarantees; the State's October 28 termination notice was not vague and provided adequate notice of Appellant's appeal rights; any failure of that letter to comply with the agency's internal policies and rules is not actionable in this SPRL appeal; the Board is not required to adopt a different filing procedure; and the Board denied Appellant's motion to amend her appeal. The Board granted the motion and dismissed the appeal. [*Editor's note*: In 2003, the legislature amended ORS 240.560(1) to provide, in part: "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than *30 days* after the effective date of the reduction, dismissal, suspension or demotion." The legislature also provided: "SECTION 2. (1) Except as provided in subsection (2) of this section, the amendments to ORS 240.560 by section 1 of this 2003 Act apply only to reductions, dismissals, suspensions or demotions occurring on or after the effective date of this 2003 Act. (2) A regular employee who was reduced, dismissed, suspended or demoted on or after July 1, 2002, and whose appeal under ORS 240.560 (1) was dismissed before the effective date of this 2003 Act for failure to timely file the appeal may, within 90 days after the effective date of this 2003 Act, file an appeal under ORS 240.560. If the employee timely files an appeal as provided in this subsection, the Employment Relations Board shall consider the appeal timely filed under ORS 240.560 and revive the previously dismissed appeal. SECTION 3. This 2003 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2003 Act takes effect on its passage." Approved by the Governor June 4, 2003. Filed in the office of Secretary of State June 5, 2003. Effective date June 4, 2003.] Ellis v. Human Services Department, Case No. MA-28-02 (February 2003).

2.1 6 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and

judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

2.1 7 In a decision about a transfer of a *program* but not *employees*, from PUC to DOT (1995 Or Laws ch. 733, sec. 1), the Board noted that, in *FOPPO v. State of Oregon*, 144 Or App 535 (1996), the court of appeals "rejected a theory that the transfer statute [ORS 236.605 *et seq.*] accords certain other types of employees contractual rights to employment." The Board held that PUC did not deprive Appellants of due process rights when it laid them off. When the legislature transferred a *program* (but not the *employees*) from PUC to DOT (1995 Or Laws ch. 733), PUC laid off Appellants and DOT did not hire them. In making its hiring decisions, DOT considered performance issues. The Board rejected Appellants' claim that the consideration of performance issues converted the layoffs (subject to the standards of ORS 240.316) to terminations (subject to the standards of ORS 240.555). Member Whalen dissented, arguing that the State's treatment of Appellants violated the due process clause of the Fourteenth Amendment. (See companion entry in this section.) Further, Member Whalen stated that, "although Appellants' termination took place pursuant to a transfer of functions, it was akin to a dismissal." (Order at 23.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

2.1 8 Fish and wildlife technician in the classified service appealed both a disciplinary pay reduction and a dismissal. Concerning the dismissal, Appellant argued that he was denied due process. The Board found that the agency had given Appellant notice of the charges on which the dismissal was based, notice that dismissal was being considered, and the opportunity to rebut the charges at predismissal hearing with the appointing authority. The Board ruled that the agency had provided the due process required under *Tupper v. Fairview Hospital and Training Center*, 276 Or 657 (1976). Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

2.1 9 Labor relations manager was removed from the management service for three specific actions. Appellant contended that the agency had violated his due process rights in removing him. The Board found that Appellant had been given written notification of the charges, that the notification informed Appellant that removal was being considered, and that Appellant had been given the opportunity to meet with the appointing authority to rebut the charges. The Board held that the agency gave Appellant all the process required. On the merits, the removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

2.1 10 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. Appellant claimed that his due process rights were violated because the pre-dismissal notice did not give him specific notice of the charges against him or the discipline being considered. The Board found that Appellant was provided adequate due process during the removal and dismissal process where the pre-dismissal notice explained that dismissal was being contemplated due to Appellant's excessive absences and tardiness, outlined supporting facts, and set up a pre-dismissal hearing. The Board held that the agency's procedures were sufficient to satisfy the due process requirements of *Tupper v. Fairview Hospital*, 276 Or 657, 665, 556 P2d 1340 (1977). The removal and dismissal were upheld. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

2.1 11 A classified employee was first demoted and then removed from her position as Office Assistant 2 for numerous performance problems. She appealed the dismissal but not the demotion. The Board rejected Appellant's argument that she was not provided constitutional due process because she was given no hearing before she was demoted, noting that Appellant had never made a timely appeal of her demotion and could not contest it in an appeal of her dismissal. The Board also found that Appellant was given an adequate opportunity to respond to and contest the charges against her in a pre-dismissal hearing. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

2.1 12 Corrections captain appealed his removal from management service position and restoration to a classified service position as a corrections officer, claiming that the agency did not follow its disciplinary policies and violated his due process rights in the removal. The Board found that the agency satisfied the notice requirements of its disciplinary polices and that the Appellant's due process rights had not been violated, noting that he had been given notice of the charges, notice of the potential discipline, and an opportunity to respond to the charges. The removal was affirmed. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

2.4 Right to privacy (Oregon Constitution Article I, Section 8) (classification new in 2001; includes only cases after that date)

2.4 1 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The

Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

2.5 Other constitutional rights (classification new in 2004; includes only cases after that date)

2.5 1 A management service employee, who worked for the Oregon University System (OUS), appealed his reassignment. The Board dismissed the appeal for lack of jurisdiction citing to ORS 351.086(1), in which the legislature had removed OUS employees from coverage under the SPRL. The Board also ruled that the appellant's citation to Article I, Sections 10, 20, and 33 of the Oregon Constitution, without explanation of their relevance, provided no basis to bar dismissal of the appeal. Slinker v. Oregon University System, Oregon Institute of Technology, Case No MA-15-07 (December 2007).

Chapter 3—Terms and Definitions

3.4 "Arbitrary"—ORS 240.086(1)

3.4 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board found that the appellant failed to meet his burden of proof that the State's decision that the employee was qualified for the appellant's position was arbitrary. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applies to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board defined "arbitrary" as an action "taken without cause, unsupported by substantial evidence, or nonrational" and stated that "[s]ubstantial evidence is more than a mere scintilla and is also defined as the type of evidence a reasonable mind might accept as adequate to support a conclusion." The Board ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position he for which he had originally agreed he was qualified. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

3.4 2 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between

McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

3.4 3 *"Arbitrary" action* is action "taken without cause, * * * unsupported by substantial evidence, or * * * nonrational," the Board stated, quoting from *Reynolds v. PUC*, Case No. MA-23-95 (November 1996). (See footnote 16.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

3.4 4 Auditors in classified service positions appealed their allocation to lower paying classifications, claiming that the reallocations were arbitrary, contrary to law or rule, or taken for political reasons. The Board held that it will find a personnel action "arbitrary" only where the action is without cause, is unsupported by substantial evidence, or is non-rational. The Board found that there was cause for the reallocations, that the reallocations were supported by substantial evidence, and that the agency's actions were rational. The appeal was dismissed. Rodriguez, Rawls et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

3.6 "Bad faith" (not in good faith)—ORS 240.560(4)

3.6 1 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false

and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

3.6 2 Appellant was removed from his management service position as part of the agency's reorganization to reduce the number of employees. Finding that ORS 240.570 was silent as to the Board's authority to review such removals, the Board applied ORS 240.086(1) and set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons," because the agency had not followed its own policy in selecting employees for layoff and removing Appellant from management service. The court of appeals reversed, holding that the ORS 240.086(1) standard did not apply to management service positions and that the proper standard was whether an action was "in good faith for cause" as provided by ORS 240.560(4). On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

3.6 3 Support services supervisor 2 was removed from management service and restored to a position in the classified service for 12 separate incidents of allegedly inappropriate conduct. The Appellant claimed that the agency acted in bad faith by removing her from the management service because she had never been disciplined before the removal, the agency had failed to give her notice of performance deficiencies, and there was no progressive discipline. The Board found that the state was justified in removing the employee based on the some of the charges which were proven and upheld the removal. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

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

3.7 1 Park manager appealed his transfer from Lake Owyhee State Park (one of few places where the Department provides employees with housing) to the unit's headquarters at Farewell Bend State Park, asserting that it was a form of discipline. The Board found that the Department had rational reasons for transferring Appellant: he enforced rules at Owyhee in a manner that offended or upset some users, and interacting with other Department employees at the headquarters was likely to assist him improve his interpersonal skills. The Board concluded that Appellant did not prove that the Department transferred him for reasons other than the good of the service and dismissed the transfer appeal. Separately, the Board concluded that Appellant failed to establish that the Department intended for the transfer to be a form of discipline. The Board noted that an individual's belief that an action is disciplinary does not make it so: "In cases involving allegations of constructive discipline, this Board and Oregon courts have required the employee to produce evidence to establish that the

employer had a disciplinary motivation." Concluding that Appellant had not met that burden, the Board also dismissed this element of the appeal. Rau v. Parks and Recreation Department, Case No. MA-2-01 (January 2002).

3.7 2 Corrections captain appealed his removal from management service and restoration to a classified service position as a corrections officer. Appellant claimed that the removal/restoration amounted to constructive discharge because it occurred during the Christmas holidays, the classified service position was located at another institution a substantial distance away, the amount of time given to report was short, and the reduction in income was substantial. He resigned, rather than take the classified position. The Board rejected Appellant's contention that he had been constructively discharged, applying the test for constructive discharge set forth in *Holley v. Department of Environmental Quality*, Case Nos. MA-9/13-89 (April 1989): (1) the employer must deliberately create the difficult working conditions, (2) with the intention of forcing the employee to quit, and (3) the employee did quit because of the difficult working conditions. In affirming the removal/restoration, the Board concluded that the evidence did not support Appellant's constructive discharge argument. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

3.7 3 Appellant filed an appeal alleging that she was constructively discharged. The agency filed a motion to dismiss, contending that Appellant's separation from employment was a voluntary resignation. The Board agreed, based on a personnel rule, and dismissed the appeal. Merrill v. Adult and Family Services, Case No. 1260 (March 1981).

3.8 "Contrary to law"—ORS 240.086(1)

3.8 1 Auditors in classified service positions appealed their reallocation to lower paying classifications, claiming that the reallocations were arbitrary, contrary to law or rule, or were taken for political reasons. Appellants contended that the agency's decision not to red-circle their salaries after the reallocation was contrary to a state personnel policy. The Board held that the policy relied on by Appellants applied to reclassification rather than position reallocations, and that ORS 240.086(1) does not give the Board the power to set aside personnel actions contrary to "policy." The appeals were dismissed. Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94/position allocation/personnel action (September 1995).

3.8 2 Appellant was removed from his management service position due to a reorganization. He appealed, alleging that the agency failed to follow its own policies in selecting employees for layoff. The Board applied ORS 240.086(1) and set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons." The court of appeals reversed, holding that ORS 240.086(1) did not apply to management service employees, and remanded the case to the Board to determine whether Appellant was laid off in violation of ORS 240.560. On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92/management service removal (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

3.8 3 The Board dismissed a petition alleging that Appellant had been denied benefits under ORS 243.230(5), 243.265, and 243.270 (statutes concerning health insurance benefits). Appellant filed the petition under ORS 240.086(2), alleging that the agency's action was "contrary to law." Citing *Phillips v. Department of Revenue*, 23 Or App 41 (1976), the Board held that, under ORS 240.086(2), it had jurisdiction to review only alleged violations of ORS Chapter 240 and ORS 243.650 through 243.782. The law at issue was outside the Board's jurisdiction. Rivers v. Adult and Family Services Division, Case No. 1334 (July 1981).

3.9 "For the good of the service"— ORS 240.316(4), 240.570(2)

3.9 1 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

3.9 2 Park manager appealed his transfer from Lake Owyhee State Park (where the Department provided him with housing) to a unit headquarters at Farewell Bend State Park, asserting that it was a form of discipline. To determine whether the transfer was "for the good of the service," as required

by ORS 240.570(2), the Board examined whether it was "arbitrary"—not supported by some rational reason. The Board observed: "The legislature has chosen to limit the rights of management service employees to appeal transfer decisions. In this appeal, we do not examine or decide whether the Department proved that the user complaints on which the transfer was based were well-founded. Instead, we decide simply whether the Department had a rational reason for transferring [Appellant], under circumstances that included a number of user complaints. In essence, in the context of a management service transfer, management can rationally consider the volume of user complaints to be more significant than appellant's version of what happened in each instance." The Board found that the Department had rational reasons for transferring Appellant: he enforced rules at Owyhee in a manner that offended or upset some users, and interacting with other Department employees at the headquarters was likely to assist him improve his interpersonal skills. The Board concluded that Appellant did not prove that the Department transferred him for reasons other than the good of the service. Appeal dismissed. Rau v. Parks and Recreation Department, Case No. MA-2-01 (January 2002).

3.10 "Implied resignation"/resignation

3.10 1 Appellant filed an appeal alleging that she was constructively discharged. The agency filed a motion to dismiss, contending that Appellant's separation from employment was a voluntary resignation. The Board agreed, based on a personnel rule, and dismissed the appeal. Merrill v. Adult and Family Services, Case No. 1260 (March 1981).

3.11 "Inefficiency"—ORS 240.555

3.11 1 Office specialist I, a classified employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial: (2) failing to promptly mail two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. Applying the "reasonable employer" test, the Board dismissed the appeal, finding that the charges were proven and that the agency acted appropriately in dismissing Appellant for inefficiency, incompetence, insubordination, indolence or other unfitness to render effective service under ORS 240.555. The Board noted that the errors upon which the dismissal was based "occurred after a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." (Order at 10.) Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

3.11 2 Custodial services supervisor appealed his removal from management service and dismissal from classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3) and affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." The Board found that Appellant's proven record of excessive absences and tardiness constituted "inefficiency" under ORS 240.555. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

3.11 3 Office assistant 2 was dismissed for a lengthy list of performance problems, some reflecting her alleged inefficiency. The Board found that the agency proved the most serious charge against Appellant—that she made a $9,000 error in compiling information about customer bills. Appellant had previously been reprimanded and demoted for performance problems. Applying the "reasonable

employer" test, the Board ruled that Appellant's error was serious enough to warrant dismissal. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

3.12 "Insubordination" – ORS 240.555

3.12 1 In the appeal of a management service employee, the Board stated there is a difference between insubordination, untruthfulness, and failure to cooperate. The Board discussed the definition of insubordination quoting from a variety of sources, including: (1) *Stephens v. Dept. of State Police*, 271 Or 390, 394, 532 P2d 788 (1977) - "[i]nsubordination can be rightfully predicated only upon a refusal to obey some order which a superior officer is entitled to give and entitled to have obeyed;" (2) *Bosserman v. Department of Environmental Quality*, Case No. MA-29-85 at 24 (December 1986) - "the refusal of an employee to obey the lawful order of a superior which the latter had the right to give;" (3) *Juono v. Department of Veterans Affairs*, Case No. 1353 (1981) - an employee's refusal must be in "willful defiance of authority," and that even grossly negligent failure to follow orders will not suffice; and (4) Brand, *Discipline and Discharge in Arbitration*, at 156-157, BNA Books 1998 - the following six qualifications to the general rule that an employee who refuses to work or obey an order of his supervisor may be guilty of insubordination must be met: (a) the refusal must be knowing, willful and deliberate—not merely negligent, (b) the order must be both explicit and clearly given, © the order must be reasonable and work related, (d) the order must be given by someone with appropriate authority—and the employee must have understood that, (e) the employee must be made aware of the consequences of failing to comply with the order, and (f) if practicable, the employee must be given time to correct the purportedly insubordinate behavior. The Board found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.12 2 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of

justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.12 3 Clerical specialist appealed her suspension for insubordination. Appellant was suspended for refusing to discuss a new check depositing procedure with her supervisor, and refusing to attend a meeting with her supervisor to discuss the depositing procedure and other issues. The Board upheld the suspension, finding that Appellant had been insubordinate. Potts v. Adult and Family Services Division, Case No. 1014 (August 1980).

3.14 "Misconduct"—ORS 240.555

3.14 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held

that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.14 2 In an appeal by a management service employee, the Board defined "misconduct" as the breach of an established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, willful in character, improper or wrong behavior, and, under ORS 240.555, involving intentional wrongdoing, citing *Schellin v. Department of Veterans Affairs*, Case No. MA-17-90 (1992) at 13-14. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.14 3 Custodial services supervisor appealed his removal from management service and dismissal from classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), and affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." The Board found that Appellant's lies to his supervisor about his intention to report to work and failure to notify his supervisor about his absences were acts of intentional wrongdoing that constitute "misconduct" under ORS 240.555. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

3.16 "Personnel action"—ORS 240.086(1)

3.16 1 Appellant alleged that the State violated an agreement settling a prior SPRL appeal by contesting his application for unemployment benefits. The Board stated that ORS 240.086(1) authorizes the Board to review "any personnel action" and that "a 'personnel action' is an employer action that affects a *current employee* or a *former employee* who appeals an action that occurred during active employment." The Board noted that the State had the right, under ORS 657.266(5), to challenge Appellant's application and that Appellant did not show that the State's challenge had any effect on his employment with the State. The Board concluded that it did not have jurisdiction over this element of the appeal. Somdah v. Public Utility Commission, Case No. MA-14-03 (September 2003).

3.16 2 Appellant alleged that the State refused to reimburse him for certain tuition expenses. Based on the ALJ's investigation, the Board stated that: on November 5, 2002, Appellant filed a circuit court small claim action against the State to collect that sum; effective November 15, he resigned from his employment; on December 20, the State filed an answer denying Appellant's small claim; and on April 24, 2003, Appellant filed the subject SPRL appeal. The Board deemed the State's denial of Appellant's request for tuition expense reimbursement to be a "personnel action," under ORS 240.086(1), and noted that Board Rule 115-45-0020(1) provides that an appeal of a personnel action must be filed "no later than 15 days after the effective date of [the personnel] action." Because

Appellant filed his appeal more than 15 days after the State's December 20 personnel action—the denial of his tuition reimbursement request—the Board dismissed the appeal as untimely. Somdah v. Public Utility Commission, Case No. MA-14-03 (September 2003).

3.16 3 Appellant's appeal of a draft, unsigned plan of assistance was ruled premature by the Board and dismissed. (The Board stated that it need not consider whether placement on a plan of assistance is an appealable "personnel action," under ORS 240.086(1).) O'Neil v. Fish and Wildlife Department, Case No. MA-22-98 (May 1999).

3.16 4 Academic degree administrator, a classified employee, received a letter his supervisor sent to the government standards and practices commission in which the supervisor criticized a complaint Appellant filed with the commission. Appellant appealed the issuance of the letter as a personnel action against him within the meaning of ORS 240.086. The Board dismissed the appeal, noting that "a threshold requirement of the law is that the employee allege that the employer actually took some kind of personnel action against the employee." (Order at 2.) The Bound concluded that the appeal did not allege that any personnel action had been taken against Appellant because he was not adversely affected in any way by the letter. Young v. Office of Educational Policy and Planning, Case No. MA-22-94 (September 1994).

3.17 "Political reasons"—ORS 240.560(3)

3.17 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service. The Board rejected appellant's argument that he was dismissed for "political reasons," that is, the agency"s fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board ultimately concluded that the State acted reasonably when it dismissed the appellant. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

3.17 2 Auditors in classified service positions appealed the reallocation of their positions to lower paying classifications, claiming that the reallocations were arbitrary, contrary to law or rule, or were taken for political reasons. Appellants contended that the reallocations were unlawfully motivated by the Secretary of State's campaign promise to reduce the number of agency managers. The Board found no evidence in the record to support Appellants' contention. The Board also held that the term "political reasons" refers only to partisan politics and that there was no evidence of any relationship between party politics and their position allocations. The appeals were dismissed. Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

3.17 3 Labor relations manager was removed from the management service for three specific charges. In challenging the removal, Appellant contended that "political pressure" from state labor unions was the real reason for his removal. The Board ruled that the phrase "political reasons" in the State Personnel Relations Law refers only to *partisan politics*, citing *Foster v. Executive Department, Emergency Management Division*, Case No. MA-15-87 (September 1988). The removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), AWOP, 132 Or App 626, 889 P2d 392 (1995).

3.17a "Progressive discipline" (classification new in 2001; includes only cases after that date)

3.17a 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.17a 2 "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." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003), at 8.

3.19 "Reasonable employer" (see also 10.1, 11.1, and 12.1)

3.19 1 In setting aside employee's removal from management service, the Board reviewed the case law regarding the State's burden of proof and the standard of review under ORS 240.570, stating: (1) the State has the burden of proving that its discipline complied with ORS 240.570(3), citing *Ahlstrom v. Department of Corrections*, Case No. MA-17-99 at 14 (October 2001), and the State meets this burden if its actions were "objectively reasonable," citing *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981), and *Morisette v. Children's Service Division*, Case No. 1410 at 23 (March 1983); (2) an objectively reasonable employer imposes sanctions proportionate to the offense; considers the employee's length and record of service; clearly defines performance

expectations; clearly expresses performance expectations to employees; informs employees when performance standards are not being met; and clearly defines and follows progressive discipline, except for gross offenses; citing *Bellish v. Department of Human Services,* Case No. MA-23-03 at 8 (April 2004), and other cases; (3) a significant factor the Board considers is whether the employee "can no longer be an effective and trusted management service employee," citing *Reynolds v. Department of Transportation,* Case No. 1430 at 10 (October 1984); and (4) management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

3.19 2 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton,* 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

3.19 3 In the appeal of a management service employee, the Board stated that it reviews the removal of an employee from management service and the dismissal of an employee from state service under a "reasonable employer" standard, which requires the Board to evaluate all circumstances of the removal or dismissal to determine whether the employer's action is objectively reasonable, citing *Brown v. Oregon College of Education,* 52 Or App 251, 628 P2d 410 (1981) and *Morisette v. Children's Services Division*, Case No. 1410 at 23 (March 1983). Quoting *Flowers v. Parks and Recreation Department,* Case No. MA-13-93 (1994) at 15, the Board defined the "fictive reasonable employer" as one whose actions are objectively reasonable and fundamentally fair; who clearly defines performance expectations, clearly expresses those expectations to employees, and informs employees when performance standards are not being met; and, most importantly, who unambiguously communicates to an employee deficiencies that it considers serious enough to warrant discipline. The Board also cited to *Peterson v. Department of General Services,* Case No. MA-9-93, at 10 (1994), in which it stated that "[a] reasonable employer also generally uses progressive discipline, except where an employee's offense is gross or the employee's behavior will not be improved through progressive measures. *OSEA Chapter 89 v. Rainier School Distr*., Case No. UP-85-85, 9 PECBR 9254, 9279 (1986)." Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.19 4 In dismissing a management service employee's reprimand appeal, the Board stated that a reasonable employer is one who disciplines employees in good faith and for cause, imposes

sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross, citing *Smith v. Department of Transportation*, Case No. MA-4-01 (June 2001); and *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986); clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met, citing *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989); and administers discipline in a timely manner, citing *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994), and *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004). Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

3.19 5 In an order setting aside the demotion of a management service employee, the Board defined a "reasonable employer" as "one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross. *Smith v. Department of Transportation*, Case No. MA-4-01 (June 2001); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989). In addition, a reasonable employer administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994)." Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

3.19 6 Nurse manager was removed from management service on the ground that she was unable to perform the duties of her position due to a medical condition. The Board noted that it had found that a reasonable employer was entitled to discipline or dismiss a classified service employee who was unable to work due to illness. Applying the same reasoning in this case, the Board dismissed the appeal, holding that the agency's decision to remove Appellant was objectively reasonable. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

3.19 7 A revenue agent in the classified service was dismissed by the agency for falsifying records and wasting the state's resources in scheduling field trips. Because Appellant admitted the charged misconduct, the Board considered only whether dismissal was an objectively reasonable penalty under the reasonable employer test. After reviewing Appellant's employment history and evidence of mitigating circumstances, the Board concluded that dismissal was objectively reasonable. Grimes v. Public Utility Commission, Case No. MA-3-5 (September 1995).

3.19 8 Office specialist 1, a classified service employee was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial; (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. The Board applied the "reasonable employer" test and dismissed the appeal: "[t]he errors which form the basis for Wilson's dismissal occurred after a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." The Board found that dismissal was reasonable, despite Appellant's more than 30 years of service to the State; the State had made "repeated efforts" to assist

Appellant in improving her performance and dismissed her only after it was clear she could not correct her deficiencies. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

3.19 9 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), finding that the employer could reasonably expect high standards of performance from a management service employee. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct," based on Appellant's proven record of excessive absences and tardiness and lies to his supervisor about his intention to report to work and failure to notify his supervisor about his absences. The Board applied the reasonable employer test twice, first to the removal from management service and then to the dismissal from classified service, holding that charges adequate to sustain a removal might not be sufficient to support a dismissal. The removal and dismissal were affirmed. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

3.19 10 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board set aside the removal and dismissal, concluding that they were not the actions of a "reasonable employer" because the agency had failed to discipline Appellant in a timely manner and one of the charges for which he was disciplined involved an incident Appellant previously had been told was resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

3.19 11 Office assistant 2 was dismissed for numerous performance problems. The Board stated that in applying the "reasonable employer" test, it asks two questions: whether the agency proved its charges against the employee, and if so, whether the discipline imposed was objectively reasonable. The Board found that the agency proved the most serious charge against Appellant—that she made a $9,000 error in compiling information about customer bills. Appellant had previously been reprimanded and demoted for performance problems. Under the circumstances, the Board concluded that dismissal was an objectively reasonable response to Appellant's performance errors, and upheld the dismissal. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

3.20 "Red-lining"

3.20 1 Auditors in classified service positions appealed the reallocation of their positions to lower paying classifications, claiming that the decision not to "red-circle" their salaries after the reallocation was arbitrary. The Board noted that red-circling or red-lining is the procedure of freezing the salary of an employee who has been placed in a lower paying classification for non-disciplinary reasons. The Board found that the policy requiring red-lining did not apply to the reallocation which affected the appellants. The appeals were dismissed. Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

3.20a "Reprimand" (classification new in 2001; includes only cases after that date)

3.20a 1 In dismissing a management service employee's reprimand appeal, the Board stated that a written reprimand, which is the mildest discipline the State can impose, is generally used to inform

an employee that particular behavior is unacceptable and should stop, and, lacking an economic impact on the employee, its primary purpose is a form of notice, citing *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02, at 13 (November 2002). Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

3.20a 2 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

3.20a 3 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals. The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting.

3.20a 4 Senior Internal Auditor 2, in the management service, was reprimanded and appealed, alleging violation of ORS 240.570(3). The Board denied the State's motion to dismiss the management service reprimand appeal on jurisdictional grounds, citing *Carter v. Corrections Department*, Case No. MA-12-99 (September 2001). After analyzing the record, the Board concluded that the State had proved two of the four charges that Appellant's conduct reflected that he was unable or unwilling to meet the standards that apply to a senior auditor. The Board stated that "a reprimand is one of the mildest forms of discipline. 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." The Board concluded that, under the circumstances, "the Department's reprimand of [Appellant] was not an excessive form of discipline and was objectively reasonable." Appeal dismissed. Hill v. Transportation Department, Case No. MA-7-02 (November 2002).

3.21 "Substantial evidence"—ORS 183.482(8)(c)

3.21 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board found that the appellant failed to meet his burden of proof that the State's decision that the employee was qualified for the appellant's position was arbitrary. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applies to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board defined "arbitrary" as an action "taken without cause, unsupported by substantial evidence, or nonrational" and stated that "[s]ubstantial evidence is more than a mere scintilla and is also defined as the type of evidence a reasonable mind might accept as adequate to support a conclusion." The Board ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position he for which he had originally agreed he was qualified. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

3.21 2 Allocation of unrepresented executive analyst 4 (salary range 30) to education program specialist (EPS) (salary range 29) was not arbitrary, contrary to law or rule, or taken for political reason, the Board held. Appellant asserted that his salary placement was arbitrary, because union-represented EPSs are compensated at salary range 31. The Board found that DAS had used a rational manner (application of the Hay classification system) in deciding to allocate Appellant's position to the EPS classification. Further, the Board stated that "the fact that represented employees in the EPS class, as a result of collective bargaining, are at salary range 31 does not make Appellant's placement at [salary range] 29 nonrational." (Order at 8.) In footnote 8, the Board determined that the allocation was supported by "substantial evidence," as that test was described in *Rodriguez v. Secretary of State*, Case No. MA-24-94 (1995) ("relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). The Board stated: "Here, DAS' comparison of job duties, use of the Hay method and explanation for placing Appellant at salary range 29 (rather than 31) conforms with this modest evidentiary test." *Decision not contrary to law or rule*. The Board found that a DAS rule requires allocations to be based on a Hay evaluation and that DAS did use that system in arriving at its decision. The Board rejected Appellant's contention that DAS did not use the Hay system and concluded that DAS's placement of Appellant in the EPS classification was not contrary to law or rule. Young v. Educational Policy and Planning Office, Administrative Services Department, Case No. MA-20-95 (July 1998).

3.21 3 Auditors in classified service positions appealed the reallocation of their positions to lower paying classifications, claiming that the reallocations were arbitrary, contrary to law or rule, or were taken for political reasons. The Board stated that a personnel action is arbitrary only if it is taken without cause or unsupported by substantial evidence. The Board quoted definitions of substantial evidence from *Rice v. Corrections Division*, Case No. 1475 (April 1985) ("more than a mere scintilla; relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Citing *Fosdick v. Oregon State Marine Board,* Case Nos. MA-23-89/MA-4-90 (August 1990), the Board noted that allocation of a position to a particular class will be set aside only if there was *no* evidentiary basis for it. The Board concluded that the decisions regarding the reallocation of Appellants' positions were rational and supported by substantial evidence and dismissed the appeals.

Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

3.22 "Unfitness to render effective service"—ORS 240.555

3.22 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

3.22 2 Office specialist I, a classified employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial: (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. Applying the "reasonable employer" test, the Board dismissed the appeal, finding that the charges were proven and that the agency acted appropriately in dismissing Appellant for inefficiency, incompetence, insubordination, indolence or other unfitness to render effective service under ORS 240.555. The Board noted that the errors upon which the dismissal was based "occurred after a lengthy period during which the employee demonstrated that

she was unable to competently perform the work assigned to her." (Order at 10.) Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

3.22 3 Support services supervisor 2 was removed from management service and restored to a position in the classified service for 12 separate incidents of allegedly inappropriate conduct. The Board found that the state was justified in removing Appellant based on the charges which were proven. The Board applied the reasonable employer standard to this management service removal, citing *Morisette v. CSD*, Case No. 1410 (1983), and concluded that the proven charges showed that the employee had failed to exercise good judgment in performance of her management service duties. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

3.22 4 Office assistant 2 was dismissed for a lengthy list of performance problems. The Board found that the agency proved the most serious charge against Appellant—that she made a $9,000 error in compiling information about customer bills. Appellant had previously been reprimanded and demoted for performance problems. Applying the "reasonable employer" test, the Board ruled that Appellant's error was serious enough to warrant dismissal. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

3.23 "Work now, grieve later"

3.23 1 A campus service supervisor in the management service was given a reduction in pay for violating a directive about having visitors during work time. Appellant claimed that the directive was invalid because it went beyond the agency's written policy. The Board noted that employees, especially management service employees, are not excused from following a directive merely because the employee considers the directive invalid. Concluding that Appellant's conduct violated the "work now, grieve later" principle, the Board dismissed the appeal. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

3.23 2 Clerical specialist appealed her suspension for insubordination. Appellant was suspended for refusing to discuss a new check depositing procedure with her supervisor and refusing to attend a meeting with her supervisor to discuss the depositing procedure and other issues. The Board found that even though Appellant had a legitimate basis for challenging the new depositing procedure, she failed to follow the "work now, grieve later" principle and thus was insubordinate. Potts v. Adult and Family Services Division, Case No. 1014 (August 1980).

3.24 Other definitions

3.24 1 *Objectively reasonable.* In setting aside employee's removal from management service, the Board reviewed the case law regarding the State's burden of proof and the standard of review under ORS 240.570, stating: (1) the State has the burden of proving that its discipline complied with ORS 240.570(3), citing *Ahlstrom v. Department of Corrections*, Case No. MA-17-99 at 14 (October 2001), and the State meets this burden if its actions were "objectively reasonable," citing *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981), and *Morisette v. Children's Service Division*, Case No. 1410 at 23 (March 1983); (2) an objectively reasonable employer imposes sanctions proportionate to the offense; considers the employee's length and record of service; clearly defines performance expectations; clearly expresses performance expectations to employees; informs employees when performance standards are not being met; and clearly defines

and follows progressive discipline, except for gross offenses; citing *Bellish v. Department of Human Services*, Case No. MA-23-03 at 8 (April 2004), and other cases; (3) a significant factor the Board considers is whether the employee "can no longer be an effective and trusted management service employee," citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984); and (4) management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

3.24 2 *Rules.* The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board found that the appellant failed to meet his burden of proof that the State's decision that the employee was qualified for the appellant's position was arbitrary. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applies to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

3.24 3 *Duties.* A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board ordered the State to rescind the appellant's removal. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

3.24 4 *Reorganization.* A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

3.24 5 *Executive service, deputy, principal assistant, supervisory employee*. In an appeal of a removal from management service, the State asserted that the Board lacked jurisdiction because the appellant was an executive service employee within ORS 240.205. ORS 240.205 provides that an executive service employee must be either a "deputy" or a "principal assistant." Under state policy, "executive service" is an amalgam of certain positions in the exempt service and the unclassified service. The policy also identifies statutory subgroups of employees who comprise the unclassified service as the components of the executive service. The Board held that the appellant was not a "deputy" because she did not report directly to any listed executive or administrative officers, did not exercise the officer's authority when the officer was absent, and the organizational chart placed appellant at least one step below the level of deputy because she reported to a deputy assistant director. Appellant was not a "principal assistant" because there was no evidence that such designation, if made, was ever approved by the DAS director or designee, which is not a mere technicality but a statutory requirement. Citing to ORS 174.101 and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), the Board stated that when construing a statute, it may not omit language that the legislature has included. The Board then considered whether appellant fell within management service. Under ORS 240.212, management service comprises all positions that are neither unclassified nor exempt, and that are either confidential, supervisory, or managerial as defined in ORS 243.650. The Board held that because appellant directly and indirectly supervised over 200 employees; planned, assigned, and approved work; responded to grievances; disciplined and rewarded employees; hired and fired; and prepared and signed performance appraisals, her duties clearly qualified her as a supervisory employee under ORS 243.650(23), and therefore a member of the management service. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

3.24 6 *Position, reinstatement, reemployment.* After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

3.24 7 *Effective date*. "Historically this Board has considered an action 'effective,' and therefore ripe for appeal, on the date when the employer changes the employee's employment status. The 'effective' date is the date on which a personnel action takes effect and the date from which the timeliness of an appeal is gauged." (Order at 5.) Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

3.24 8 *Temporary employee.* Mental health therapy technician appealed his dismissal. He had been employed in a temporary position for more than 20 months. The agency admitted that it had failed to file forms required by rule to report the extension of Appellant's temporary employment. The Board

found that the agency had been given authority to extend Appellant's temporary employment under ORS 240.309(4) and concluded that the failure to file the required forms was a procedural violation which did not make Appellant's continuing employment unlawful. The Board also noted Appellant failed to prove that he had been denied permanent employment because of his temporary status. Trotts v. Oregon State Hospital, Case No. MA-9-95 (October 1995).

3.24 9 Regular employee. An inmate in a correctional institution filed an appeal concerning his dismissal from a position as a skilled cartographer in the prison industries program. The Board dismissed the appeal for lack of jurisdiction. The Board found that Appellant was not a "regular employee" as that term is defined in ORS 240.013(8) because he had not been *appointed* to a position which was part of the state classification system and had not completed a trial service period. The Board noted that it has jurisdiction only to hear appeals concerning the dismissal of regular employees. Hill v. Department of Corrections, Case No. MA-15-95 (October 1995).

3.24 10 *Final decision*. A temporary employee filed an appeal alleging that he had been denied permanent employment in violation of ORS 240.309. The Board noted that OAR 115-45-017 required that the appeal be filed with the Board "[n]o later than 15 days after receipt by the employee of the final decision of the Agency Head." The Board concluded that the "final decision" referred to in this rule was the agency head's decision to allow the temporary employment to end. Because Appellant filed his appeal with the Board more than 15 days after his temporary employment ended, the Board ruled the appeal untimely. Gibson v. Eastern Oregon Psychiatric Center, Training Center, and Support Services, Case No. MA-14-95 (October 1995).

3.24 11 *Final decision.* Auditors in classified service positions appealed the reallocation of their positions to lower paying classifications. The appeal was filed under OAR 115-45-015, which provided that Appellants could appeal "not later than 15 days after receiving the final decision of the appointing authority. The agency filed a motion to dismiss, on the basis that Appellants had not exhausted the agency grievance procedure before appealing, contending that the reference in the rule to "final decision" meant the agency's final decision on an appellant's grievance. The Board found that Appellants were not required to exhaust the applicable agency grievance procedure under OAR 115-45-015(1) before bringing their appeals to the Board, ruling that Appellants could properly appeal the appointing authority's final decision on the reallocation. The Board dismissed the appeals on the merits. Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

3.24 12 *Reorganization.* Appellant appealed his removal from management service pursuant to a reorganization, claiming that the agency had failed to follow its own layoff policies. The agency contended that the Board had no jurisdiction to determine whether it followed its policies. The Board applied ORS 240.086(1) and set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons," because the agency had not followed its own policy in selecting employees for layoff. The court of appeals reversed, holding that ORS 240.086(1) did not apply to management service employees, and remanded the case to the Board to determine whether Appellant was laid off in violation of ORS 240.560. On remand, the Board decided that, in reviewing management service appeals, it would apply the "for cause" standard to the causes listed in ORS 240.570(2) and (3). Using that standard, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because Appellant was removed due to a legitimate reorganization and there was no evidence that the agency's failure to follow its

own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

3.24 13 *Regular employee.* A temporary employee appealed his termination, alleging that there was no legitimate reason. The Board concluded that the issues raised by Appellant did not establish that the agency violated the temporary appointment statute, ORS 240.309, and dismissed the appeal. The Board noted that ORS 240.086 or 240.560 apply only to "regular" employees, and that it did not have jurisdiction to consider a temporary employee's appeal under those statutes. Smith v. Fairview Training Center, Case No. MA-22-93 (February 1994).

3.24 14 *Reclassification.* Contracts officer in management service appealed the reclassification of his position, alleging that it was really a demotion. The Board, citing *Gearhart v. Employment Division*, Case Nos. 1400/1401 (April 1983), found that Appellant had not been demoted because he was not moved from a position in one classification to a position in another classification; he remained in the same position, but the position was allocated to a different classification. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

Chapter 4—Issuance of Personnel Action and Statement of Charges

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

4.1 1 The Board set aside a management service employee's removal for planning and playing a practical joke on a co-worker in part because at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

4.1 2 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

4.1 3 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

4.1 4 Fish and wildlife technician in the classified service appealed pay reduction imposed for his failure to set an alarm board at the fish hatchery. Appellant contended that the discipline was unfair because there was no written policy on setting the alarms. The Board, in affirming the pay reduction, found that Appellant was an experienced worker who acknowledged that he shared responsibility for setting the alarm. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

4.1 5 Office specialist I, a classified employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial: (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. Applying the "reasonable employer" test, the Board dismissed the appeal, finding that the charges were proven and that the agency acted appropriately in dismissing Appellant. The Board noted that the dismissal occurred after her supervisors had made "repeated efforts" to assist her: "her supervisors had counseled her, admonished her, and eventually imposed progressively more serious disciplinary measures upon her in an attempt to correct problems on the job." (Order at 11.) Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

4.1 6 Labor relations manager was removed from the management service for several actions, including making ex parte contact with an interest arbitrator and filing an Oregon State Bar complaint against the union attorney involved in the interest arbitration. Appellant contended that he had been given no specific warning or direction about filing Bar complaints or contacting interest arbitrators. The Board found that Appellant's supervisor had told the labor relations managers to avoid communicating with interest arbitrators in a manner which would reflect negatively on the union's representative. The Board also found that the Appellant's supervisor had told Appellant not to file a Bar complaint against a union attorney without informing her first. The removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

4.1 7 Office assistant 2 was dismissed for performance problems, including billing errors totaling $9,000, failure to complete an equipment inventory, repeated typographical errors, and misrouting of mail. She had previously been reprimanded and demoted for performance problems. The Board

found that the agency had given her sufficient notice of her performance problems and ample opportunity to correct them. Applying the "reasonable employer" test, the Board ruled that Appellant's billing error alone was serious enough to warrant dismissal. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

4.1 8 Campus service supervisor in the management service was given a reduction in pay for failing to effectively search for a client who left the campus and for having a visitor during work hours in violation of a directive from his superiors. In light of Appellant's previous reprimand for poor judgment, the Board found that the State had acted reasonably in disciplining Appellant. The Board held that the State had conducted a fair investigation into the incidents upon which discipline was based and that the discipline was not taken in reprisal for an earlier grievance. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

4.1 9 Fiscal auditor 3 appealed an unsatisfactory performance appraisal rating score. The Board dismissed the petition, finding that he had been given adequate notice that his work was not meeting minimum expectations. Norbeck v. Mental Health Division et al., Case No. 1359 (March 1982); order reaffirmed (May 1982).

4.2 Clarity and specificity of charges

4.2 1 The State's dismissal letter of a management service employee failed to expressly remove the appellant from management service. The Board held that such removal was inherent in the appellant's dismissal from classified service and it would not require that the grounds for the removal from management service and dismissal from classified service be separately stated. However, the Board must address both issues. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

4.2 2 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

4.3 Waiver of prosecution—failure to discipline in a timely manner (see also 6.7)

4.3 1 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

4.3 2 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

4.3 3 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3)

falsely telling a supervisor that an employee had called the manager a racial slur. The Board set aside the removal and dismissal, concluding that the agency had cause to remove Appellant from the management service for the first two charges, which were proven, but the agency's action in doing so was not that of a "reasonable employer." The Board determined that the State had failed to discipline Appellant in a timely manner: the first incident had been ignored by the agency for a year and agency had told Appellant previously that the second incident was resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

4.5 Rescission and reimposition of personnel action

4.5 1 The Board dismissed the appeal of a reprimand after the State notified the appellant and the Board that it was rescinding the reprimand and moved to dismiss the appeal, and the appellant did not respond. Puckett v. Department of Human Services, Oregon State Hospital, Case No. MA-13-05 (March 2007).

4.5 2 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow his lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board ultimately determined that the appellant was aware of his supervisors' concerns, had failed to address them, and that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

4.5 3 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. Earlier, the State removed Appellant from management service and *demoted* him into a classified service position but later rescinded that action and then removed him from management service and *dismissed* him from classified service. The Board rejected Appellant's assertion that he should be treated as a classified service employee and provided with union representation, stating that the rescission "nullified the removal action, just as if it had never happened" and that he could not "accept the benefits of management service without also accepting the standard applied to management service." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

4.5 4 Principal executive manager B, with no prior classified service, was removed from management service for his inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily, under ORS 240.570(3), and he appealed. The State's removal letter contained a statement of Appellant's appeal rights. The State later rescinded the removal and presented a different statement of his appeal rights. Appellant filed his appeal with the Board more than ten days after the effective date of the removal. The Board quoted ORS 240.560(1), which states that a *regular* employee who is reduced, *dismissed*, suspended or demoted, shall have the right to appeal to the board not later than 10 days after the effective date of such . . . ." The Board stated that removal of Appellant, a *management service* employee with no prior classified service, amounted to a *dismissal* from State service. [*Editor's note:* The Board did not specifically state that ORS 240.570(4) provides that employees removed from management service, for reasons specified in ORS 240.570(3), "may appeal to the board in the manner provided by ORS 240.560."] Because Appellant's appeal was filed

more than 10 days after the effective date of his removal, the Board dismissed the appeal as untimely. Balderas v. Human Services Department, Case No. MA-10-02 (July 2002), AWOP, 189 Or App 596, 77 P3d 645, rev den, 336 Or 296, 84 P3d 815 (2003).

4.5 5 Mental health supervising RN in the management service received a one-step, two-month pay reduction for her failure to disclose contacts she received from a suspended employee. At the hearing, the agency rescinded the pay reduction and issued a letter of reprimand based on the same conduct. The Board affirmed the issuance of the reprimand, finding that the agency's action was objectively reasonable because Appellant acted contrary to her obligations as a management service employee by knowingly withholding information from her employer. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

Chapter 5—Appeal Procedure

5.2 Appeal to ERB
5.2.2 Timeliness (see also 17.2 and 18.1)

5.2.2 1 The Board dismissed a management service employee's appeal of a reprimand for untimeliness and lack of prosecution citing *McMinnville Firefighters Association v. City of McMinnville*, Case No UP-4-94, 15 PECBR 83 (1994). The Board found that the information received with the appeal showed that the appeal had been received by the Board 31 days after the reprimand was issued and the appellant had failed to respond to the ALJ's notice that the appeal would be dismissed unless she provided information which showed that her appeal was timely filed. Moriarty v. Department of Human Services, Case No. MA-4-06 (October 2006).

5.2.2 2 Principal executive manager B, with no prior classified service, was removed from management service for his inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily, under ORS 240.570(3), and he appealed. The State's removal letter contained a statement of Appellant's appeal rights. The State later rescinded the removal and presented a different statement of his appeal rights. Appellant filed his appeal with the Board more than ten days after the effective date of the removal. The Board quoted ORS 240.560(1), which states that a *regular* employee who is reduced, *dismissed*, suspended or demoted, shall have the right to appeal to the board not later than 10 days after the effective date of such . . . ." The Board stated that removal of Appellant, a *management service* employee with no prior classified service, amounted to a *dismissal* from State service. [*Editor's note:* The Board did not specifically state that ORS 240.570(4) provides that employees removed from management service, for reasons specified in ORS 240.570(3), "may appeal to the board in the manner provided by ORS 240.560."] Because Appellant's appeal was filed more than 10 days after the effective date of his removal, the Board dismissed the appeal as untimely. Balderas v. Human Services Department, Case No. MA-10-02 (July 2002), AWOP, 189 Or App 596, 77 P3d 645, rev den, 336 Or 296, 84 P3d 815 (2003).

5.2.2 3 Management service employee appealed his reprimand, effective March 14, 2003, through a letter received by the Board on April 21, 2003. After citing the statute and rules that provide that a management service employee's reprimand appeal must be received by the Board within ten days of the reprimand's effective date, the Board dismissed the appeal as untimely. Carter v. Corrections Department, Case No. MA-13-03 (May 2003).

5.2.2 4 The Board denied the agency's motion to dismiss the appeal as untimely, stating that: (1) the agency was not prejudiced by Wang filing this appeal before the agency actually terminated Wang's pay-line exception, and (2) the agency's delay in raising the objection would effectively preclude Wang from re-filing her appeal within ten days of the agency's implementation of its decision to terminate her pay exception. Wang v. Geology and Mineral Industries Department, Case No. MA-12-02 (May 2003).

5.2.2 5 Child welfare human services manager appealed the termination of her employment effective October 28, 2002. Appellant sent her appeal to the Board on November 5, and the Board received it on November 12. ORS 240.560(1) (classified service employees) and 240.570(5) (management service employees, by reference) provide that a dismissal appeal may be filed "not later than *10 days* after the effective date of" the dismissal. The State moved to dismiss the appeal as untimely. The Board stated that it strictly applies the ten-day filing rule; its policy not to excuse late filings for "good cause" does not violate due process guarantees; the State's October 28 termination notice was not vague and provided adequate notice of Appellant's appeal rights; any failure of that letter to comply with the agency's internal policies and rules is not actionable in this SPRL appeal; the Board is not required to adopt a different filing procedure; and the Board denied Appellant's motion to amend her appeal. The Board granted the motion and dismissed the appeal. [*Editor's note*: In 2003, the legislature amended ORS 240.560(1) to provide, in part: "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than *30 days* after the effective date of the reduction, dismissal, suspension or demotion." The legislature also provided: "SECTION 2. (1) Except as provided in subsection (2) of this section, the amendments to ORS 240.560 by section 1 of this 2003 Act apply only to reductions, dismissals, suspensions or demotions occurring on or after the effective date of this 2003 Act. (2) A regular employee who was reduced, dismissed, suspended or demoted on or after July 1, 2002, and whose appeal under ORS 240.560 (1) was dismissed before the effective date of this 2003 Act for failure to timely file the appeal may, within 90 days after the effective date of this 2003 Act, file an appeal under ORS 240.560. If the employee timely files an appeal as provided in this subsection, the Employment Relations Board shall consider the appeal timely filed under ORS 240.560 and revive the previously dismissed appeal. SECTION 3. This 2003 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2003 Act takes effect on its passage." Approved by the Governor June 4, 2003. Filed in the office of Secretary of State June 5, 2003. Effective date June 4, 2003.] Ellis v. Human Services Department, Case No. MA-28-02 (February 2003). See also the following entry.

5.2.2 6 In 2003, the legislature amended ORS 240.560(1) to provide: "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than [*10*] **30** days after the effective date of [*such*] **the** reduction, dismissal, suspension or demotion. **The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion.** [*Such*] **The board shall hear the** appeal [*shall be in writing and shall be heard by the board*] within 30 days after [*its receipt*] **the board receives the appeal, unless the parties to the hearing agree to a postponement.** The board shall furnish the division of the service concerned with a copy of the appeal in advance of the hearing." See also the prior *The SPRL Digest 2001-2003* entry in this section for Ellis v. Human Services Department, Case No. MA-28-02 (February 2003).

5.2.2 7 Management service employee appealed a transfer that was effective December 10. On December 7, he grieved that action with the Department, which (incorrectly, the Board stated) responded that the transfer was subject neither to being grieved nor being appealed. The Board noted that Board Rule 115-40-023(2) provides that a management service employee may appeal a transfer not later than 10 days after its effective date. Appellant filed his appeal on December 31, more than 10 days after the effective date of his transfer, because he thought that the period to appeal to the Board would begin at the conclusion of the agency grievance procedure. Citing *Smith*, Case No. MA-2-98 (April 1998), AWOP 166 Or App 238, 999 P2d 563 (2000), which involved a similar situation, the Board dismissed the appeal as untimely. Cook v. Justice Department, Child Support Division, Case No. MA-20-01 (January 2002).

5.2.2 8 *Classified service termination appeal*. Respondent removed Appellant from management service and dismissed her from classified service by letter dated December 2, 1997. The letter stated that, to contest the action, Appellant was required to file a written appeal to the Department director within 15 days of the effective date of the action. Appellant did so, and the director denied the appeal. On January 12, 1998, Appellant appealed to the Board. Regarding the *classified service termination* appeal, the Board noted that ORS 240.560 and Board Rule 115-45-010(2) require such appeals to be filed "no later than 10 days after the effective date of such [dismissal] action." Appellant presented two arguments that the classified appeal was timely. First, she argued that she had followed the timelines specified in the Department's December 2 letter. The Board stated that the Department's letter "incorrectly stated that [Appellant] had 15 days in which to appeal the [classified service] termination." (Order at 4.) The Board rejected Appellant's argument, stating that to rule the classified service appeal timely "would be contrary to law and Board rule." (Order at 4.) Second, Appellant argued that the Department actually had considered her appeal, which meant that the action was not final (and "effective") until the director issued a decision on the appeal. The Board rejected that argument, stating that an action is "effective" on the date when the employer changes the employee's employment status. In this case, that date was December 2, and Appellant filed her appeal more than 10 days after that date. Appeal dismissed. As to the *management service removal* appeal, the Board initially ruled that it was timely and remanded it to an ALJ for hearing. The Board stated that the management service appeal had been filed within the 15-day period specified in Board Rule 115-45-023, which provided that such filings were to occur "no later than 15 days after receiving written notification of the final decision of the agency head." (See companion entries in sections 1.3, 12.3.1, and 12.3.8.) In her October 1998 dissent, Member Whalen argued that the Department "improperly characterized Smith's termination from state service as involving two distinct personnel actions" (Order at 9) and that the termination "is properly viewed as a single personnel action—dismissal—because of her status in state service" and the terms of ORS 240.570(5). (Order at 10.) Member Whalen also argued that principles of estoppel rendered timely the classified service dismissal appeal. As a result, Member Whalen stated that the appeal was timely and warranted a hearing. Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

5.2.2 9 Appellant mailed his appeal to the wrong address ("Department of Employment, Employment Relations Board, Hearings Division, Salem, OR 97310"), where it was forwarded to the Board. The Board received the appeal more than 15 days after the Department denied Appellant's appeal and dismissed the appeal as untimely. When the Department denied Appellant's appeal, it

stated that he could appeal to the Board "not later than 15 calendar days after the effective date of the decision." Recognizing "the potential for confusion, as occurred here," the Board encouraged agencies "to provide appellants not only with the *name* of [the Board] but also [the Board's] *address*." Frederiks v. Transportation Department, Case No. MA-19-97 (February 1998), AWOP 160 Or App 436, 981 P2d 401 (1999).

5.2.2 10 Appellant's appeal of a draft, unsigned plan of assistance was ruled premature by the Board and dismissed. (The Board stated that it need not consider whether placement on a plan of assistance is an appealable "personnel action," under ORS 240.086(1).) O'Neil v. Fish and Wildlife Department, Case No. MA-22-98 (May 1999).

5.2.2 11 Reallocation appeal was timely, the Board ruled, where Appellant filed it within 15 days after the agency head's grievance procedure response was due. The Board determined that the agency head's "final decision" (under OAR 115-45-015, as revised December 1, 1995) did *not* occur when the agency head: (a) told Appellant that DAS determined that a lower classification was more appropriate than his then-current classification, or (b) told Appellant that the agency would take no further action regarding the classification to which he was being allocated. The Board found that the agency head had questioned the DAS determination and, during grievance processing, told Appellant that she would also attempt to address his concerns in other ways. Under the circumstances, the Board concluded that the agency head's failure to respond to Appellant's grievance amounted to her "final decision," for the purpose of determining the timeliness of the appeal. Because the appeal was filed within 15 days after the agency head's failure to respond, the Board ruled the appeal timely. (In footnote 6, the Board stated that "it would work a manifest injustice to construe this Board's prior rule in a way that precluded a decision on the merits.") Young v. Educational Policy and Planning Office, Administrative Services Department, Case No. MA-20-95 (July 1998).

5.2.2 12 Appellant who knowingly withdrew her appeal was not permitted to revive and prosecute that appeal, the Board ruled, where she submitted that request three months after withdrawing. Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

5.2.2 13 Natural Resource Specialist (NRS) 3 appealed his placement in that classification, contending that he should be classified as a NRS 4 (Case No. MA-18-96). In settlement of that appeal, the Department agreed to request an individual from outside of the Department to conduct a classification review and Appellant agreed to withdraw his appeal. About a year later, after the new review confirmed the NRS 3 placement, Appellant filed a second appeal challenging the classification (Case No. MA-8-97). Because the appeal was not filed within 15 days after the final decision of the agency head (as required by OAR 115-45-020), the Board dismissed the appeal as untimely. O'Neil v. Fish and Wildlife Department, Case No. MA-8-97 (September 1997).

5.2.2 14 Temporary employee's employment ended December 30, 1996. In an appeal filed February 28, 1997, she alleged that the termination was unfair. Board Rule 115-45-017 provided, at that time, that appeals claiming a violation of the temporary employment statute, ORS 240.309, must be filed "no later than 30 days after the employee knew or should have known of the action being appealed." The Board dismissed Appellant's appeal as untimely, observing that, to be timely, it should have been filed no later than January 29, 1997. (The Board also observed that a conflict existed between temporary employee appeal rules adopted by the Board and by DAS, but the Board noted that the

conflict did not affect Appellant's appeal.) Cole v. Department of Administrative Services, Case No. MA-3-97 (March 1997).

5.2.2 15 The Board dismissed as untimely an appeal of a temporary employee who alleged that he had been denied permanent employment in violation of ORS 240.309. The Board noted that in order to obtain review under OAR 115-45-017, as the rule regarding temporary appointments was phrased at the time, an appellant had to file the appeal with the Board "[n]o later than 15 days after receipt by the employee of the final decision of the Agency Head." The Board concluded that the "final decision" referred to in this rule was the agency head's decision to allow the temporary employment to end. Because Appellant filed his appeal with the Board more than 15 days after his temporary employment ended, the Board ruled his appeal untimely. Gibson v. Eastern Oregon Psychiatric Center, Training Center, and Support Services, Case No. MA-14-95 (October 1995).

5.2.2 16 Correctional food service manager in the management service was demoted to a position in the classified service. The Board dismissed the appeal of her demotion under OAR 115-45-023(2) as untimely because it was filed more than 15 days from the date on which she received the final decision of the agency head. Appellant had filed her appeal with the wrong agency and was not notified of her error until after the deadline for filing with the Board had passed. The Board noted that the deadlines for filing under the SPRL are jurisdictional, and they had always been strictly applied. Nelson v. Department of Corrections, Case No. MA-36-94 (January 1995).

5.2.2 17 Supervising accountant appealed her disciplinary removal from management service. OAR 115-45-023 requires such appeals to be filed within 15 days of the appellant's receipt of the agency head's decision on the appeal. The appeal was not received by the Board within the required 15 days. In dismissing the appeal as untimely, the Board noted that the filing deadlines were jurisdictional and that it had always strictly applied the time deadlines. Shepard-Lamb v. Adult and Family Services Division, Case No. MA-29-94 (October 1994).

5.2.2 18 Classified employee appealed a one-step, six month pay reduction. The Board dismissed the appeal as untimely because Appellant did not file the appeal with the Board within the 10 days required by ORS 240.560(1) and OAR 115-45-010(1). Citing *Phillips v. Worker's Compensation Department*, Case No. 1463 (1984), the Board rejected Appellant's argument that the appeal should be considered timely because she notified her supervisor within 10 days that she wanted to appeal the pay reduction to the Board. Wilson v. Oregon State Police, Case No. MA-4-94 (May 1994).

5.2.2 19 The Board dismissed as untimely the appeal filed by a systems and programming supervisor concerning his nondisciplinary removal from management service and work schedule change. Appellant conceded that his appeal had not been *received* by the Board within 15 days of the agency head's response, as required by Board rules, but argued that he had relied on an agency rule which had only required that the appeal be *sent* within the 15 day time limit. The Board rejected that argument, noting that agency policies could not be used to extend the time limit contained in Board rules. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

5.2.2 20 Office assistant 2 was demoted and then dismissed for various performance problems and appealed the dismissal. Appellant argued that she had been denied due process because the agency had not given her a hearing before demoting her. The Board rejected that argument, holding that

Appellant had failed to make a timely appeal of the demotion. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

5.2.2 21 In dismissing the reclassification appeal of a management service contracts officer for lack of subject matter jurisdiction, the Board noted that the appeal was premature because the action being appealed had not yet occurred. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

5.2.2 22 The Board dismissed as untimely the appeal of an adult parole and probation officer concerning a decrease in vacation leave accrual which arose after the transfer of state corrections personnel to county service under ORS 423.550. Appellant filed her appeal more than 180 days after she received notice of the change in the rate of vacation leave accrual. Because ORS 423.550 provides that disputes about employee transfers will be resolved by the Board in the same way that labor disputes are, the Board found that the appeal was untimely under ORS 243.672(4), which requires an unfair labor practice to be filed within 180 days of its occurrence. Oatley v. Multnomah County, Case No. TA-1-92 (May 1993). [NOTE: this case did not arise under the State Personnel Relations Law; it is reported here for information about the Board's approach to timeliness issues.]

5.2.2 23 The Board dismissed as untimely the appeal of a principal executive manager A challenging the agency's refusal to consider her request for reclassification to principal executive manager B during a reorganization. The Board rejected Appellant's argument that the agency's grievance procedure, which provided that appeals to the Board had to be "submitted" within 15 days of the final management decision, impliedly waived the Board's time deadline, which requires that appeals be received within 15 days of the final management decision. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

5.2.2 24 The Board dismissed an appeal concerning calculation of service credits and demotion where Appellant did not file it with the Board within 15 days of receiving the response from the Executive Department, as required by Board Rule 115-45-015. Robinson v. Adult and Family Services Division, Case No. 1343 (July 1981).

5.2.2 25 The Board dismissed an appeal under ORS 240.560 because it was filed more than 10 days after the effective date of a personnel action. The Board noted that the appeal had been mistakenly sent to another state agency but concluded that even if receipt by that agency was considered the filing date, the appeal was untimely. Russell v. Department of Transportation, Case No. 1286 (May 1981).

5.2.3 Pleading requirements

5.2.3 1 The Board dismissed the appeal of a reprimand after the State notified the appellant and the Board that it was rescinding the reprimand and moved to dismiss the appeal, and the appellant did not respond. Puckett v. Department of Human Services, Oregon State Hospital, Case No. MA-13-05 (March 2007).

5.2.3 2 The Board dismissed the appeal of a reprimand by a classified employee for failure to state a claim and for lack of prosecution, citing *Young v. Office of Educational Policy and Planning*, Case No. MA-22-94 (September 1994). The Board found that the appellant failed to include facts that

would show that the State's actions were arbitrary, in violation of law, or taken for political reasons as provided under ORS 240.086 and failed to respond to a warning from the ALJ that the appeal would be dismissed unless it was amended to include the requisite allegations. McKinney v. Department of Transportation, Case No. MA-12-06 (December 2006).

5.2.3 3 Appellant who knowingly withdrew her appeal was not permitted to revive and prosecute that appeal, the Board ruled, where she submitted that request three months after withdrawing. Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

5.2.3 4 The Department imposed a six-month salary reduction; Appellant appealed; and the Department withdrew the discipline and began the process of removing Appellant from management service. The ALJ requested Appellant to withdraw the appeal, and he refused. Stating that no question of law or fact existed, the Board dismissed the appeal. Jackson v. Corrections Department (SRCI), Case No. MA-5-98 (April 1998).

5.2.3 5 A management service employee appealed the denial of a promotion to correctional captain. During the investigation of the appeal, the administrative law judge warned Appellant that she would recommend dismissal of the appeal for lack of subject matter jurisdiction, unless Appellant could show cause why the appeal should not be dismissed. Appellant did not respond. The Board dismissed the appeal because denial of a promotion is not an appealable personnel action for management service employees under ORS 240.570. Herron v. Eastern Oregon Correctional Institution, Case No. MA-5-95 (June 1995).

5.2.3 6 Correctional food service manager in the management service was demoted to a position in the classified service. The Board dismissed the appeal of her demotion under OAR 115-45-023(2) as untimely because it was filed more than 15 days from the date on which she received the final decision of the agency head. Appellant had filed her appeal with the wrong agency and was not notified of her error until after the deadline for filing with the Board had passed. The Board noted that the deadlines for filing under the SPRL are jurisdictional, and they had always been strictly applied. Nelson v. Department of Corrections, Case No. MA-36-94 (January 1995).

5.2.3 7 The Board dismissed the appeal of a temporary employee terminated from the classified service for lack of prosecution after Appellant repeatedly failed to respond to the administrative law judge's requests for information about the status of his position or amend the complaint. Bassetti v. Children's Services Division, Case No. MA-31-94 (November 1994).

5.2.3 8 Academic degree administrator, a classified employee, received a letter his supervisor sent to the government standards and practices commission in which she criticized a complaint he filed with the commission. Appellant appealed the issuance of the letter as a personnel action against him within the meaning of ORS 240.086. The Board dismissed the appeal, finding the appellant did not allege that any personnel action had been taken him because he was not adversely affected in any way by the letter. The Board also dismissed the appeal for lack of prosecution. Young v. Office of Educational Policy and Planning, Case No. MA-22-94 (September 1994).

5.2.3 9 A temporary employee filed an appeal alleging that his termination was without a legitimate reason. The administrative law judge told Appellant that the appeal did not appear to challenge the

termination as a violation of ORS 240.309, and that the Board did not have jurisdiction to hold a hearing to determine the legitimacy of the termination. Appellant did not make a substantive response. The appeal was dismissed. Smith v. Fairview Training Center, Case No. MA-22-93 (February 1994).

5.2.3 10 The Board dismissed a petition alleging that an arbitrator had "imperfectly executed" his powers so that a final award had not been made on the grievance submitted to him. The Board noted that Appellant had not complied with Board rules in filing the petition because the petition was not accompanied by a copy of the arbitration award. However, the Board found that Appellant had made a good faith effort to comply with the rule and that the failure to comply did not prejudice the agency. The Board dismissed the appeal on the merits. Richey v. State of Oregon, Corrections Division, Case No. A-1466 (June 1984).

5.2.4 Amendment of appeal letter

5.2.4 1 Appellant who knowingly withdrew her appeal was not permitted to revive and prosecute that appeal, the Board ruled, where she submitted that request three months after withdrawing. Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

5.2.5 Dismissal for lack of prosecution

5.2.5 1 A management service employee requested that the appeal of his removal from management service be held in abeyance pending the outcome of related criminal proceedings. The Board dismissed the appeal for lack of prosecution after the appellant failed to respond to the ALJ's query about the status of the criminal case and the ALJ's subsequent warning that the appeal would be dismissed unless the appellant notified the ALJ that he was ready to proceed with his appeal. Monem v. Department of Corrections, Case No. MA-05-07 (November 2007).

5.2.5 2 The Board dismissed the appeal of a reprimand after the State notified the appellant and the Board that it was rescinding the reprimand and moved to dismiss the appeal, and the appellant did not respond. Puckett v. Department of Human Services, Oregon State Hospital, Case No. MA-13-05 (March 2007).

5.2.5 3 The Board dismissed the appeal of a reprimand by a classified employee for failure to state a claim and for lack of prosecution, citing *Young v. Office of Educational Policy and Planning,* Case No. MA-22-94 (September 1994). The Board found that the appellant failed to include facts that would show that the State's actions were arbitrary, in violation of law, or taken for political reasons as provided under ORS 240.086 and failed to respond to a warning from the ALJ that the appeal would be dismissed unless it was amended to include the requisite allegations. McKinney v. Department of Transportation, Case No. MA-12-06 (December 2006).

5.2.5 4 The Board dismissed a management service employee's appeal of a reprimand for untimeliness and lack of prosecution citing *McMinnville Firefighters Association v. City of McMinnville,* Case No UP-4-94, 15 PECBR 83 (1994). The Board found that the information received with the appeal showed that the appeal had been received by the Board 31 days after the reprimand was issued and the appellant had failed to respond to the ALJ's notice that the appeal

would be dismissed unless she provided information which showed that her appeal was timely filed. Moriarty v. Department of Human Services, Case No. MA-4-06 (October 2006).

5.2.5 5 The Board dismissed the appeal of a reprimand for lack of prosecution when the appellant verbally notified the ALJ that the matter had been resolved, but failed to respond to the ALJ's request for a written withdrawal. Land v. Office of Energy, Case No. MA-6-05 (December 2005).

5.2.5 6 The Board dismissed the appeal of a transfer when the appellant failed to contact the ALJ after being warned that his appeal would be dismissed for want of prosecution unless he responded, citing *LaBarre v. Department of Human Resources*, Case No. MA-20-98 (March 1999). Jepson v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-7-05 (November 2005).

5.2.5 7 The Board dismissed a management service employee's appeal of his removal for lack of prosecution after appellant verbally notified the ALJ that he was withdrawing his appeal, but failed to respond to the ALJ's request for a written withdrawal. Jones v. Oregon Youth Authority, Case No. MA-1-05 (May 2005).

5.2.5 8 The Board dismissed a management service employee's appeal of termination for want of prosecution after appellant failed to respond to the ALJ's warning that the appeal would be dismissed if appellant did not contact her to set a hearing date. The Board cited *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Crawford v. Department of Corrections, Case No. MA-4-04 (October 2004).

5.2.5 9 A management service employee filed an appeal alleging that the State had violated a hiring agreement under which he was to receive a wage increase after one year of employment. The Board dismissed the appeal for lack of jurisdiction, citing, *Mitchell v. Teacher's Standards and Practices Commission*, Case No. MA-8-89 (August 1989), in which the Board held that an agency's failure to pay a salary increase promised to a management service employee when he had been hired was not subject to appeal under ORS 240.570(3). The Board also dismissed the appeal for lack of prosecution because the appellant failed to respond to the ALJ's dismissal warning, citing *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Savage v. Department of Transportation, Case No. MA-38-03 (February 2004).

5.2.5 10 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 her dismissal. The 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. Parra v. Fish and Wildlife Department, Case No. MA-24-03 (November 2003).

5.2.5 11 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. Carmoney v. Employment Department, Case No. MA-9-03 (April 2003).

5.2.5 12 Appellant appealed reprimand but failed to respond to the assigned ALJ's direction to provide additional information about her appeal. The Board dismissed the appeal for lack of prosecution. Cissna v. Eastern Oregon Psychiatric Center, Case No. MA-14-01 (November 2001).

5.2.5 13 Appellant's failure to respond to the ALJ's request for her reply to a position taken by the employer resulted in dismissal of the appeal for want of prosecution. Martin v. Fairview Training Center, Case No. MA-3-99 (June 1999).

5.2.5 14 Appellant's failure to respond to the ALJ's request for information to process the appeal resulted in dismissal of the appeal for want of prosecution. LaBarre v. Human Resources Department, Director's Office, Case No. MA-20-98 (March 1999).

5.2.5 15 When Appellant did not respond to ALJ's case processing inquiries, the Board dismissed the appeals for lack of prosecution. The Board cited *Bassetti v. CSD*, Case No. MA-31-94 (November 1994) and *Hopkins v. Fairview Training Center*, Case No. MA-10-93 (November 1994). Gilmour v. Department of Forestry, Case No. MA-11/15-96 (December 1996).

5.2.5 16 Temporary employee's failure to respond to the ALJ resulted in dismissal of the appeal; the Board cited *Kirsch v. PUC*, Case No. MA-14-94 (September 1994) (failure to respond to ALJ amounted to lack of prosecution and warrants dismissal). The ALJ had sent Appellant information provided by the agency about its position. The agency asserted that it had the authority to extend Appellant's temporary employment, made the extension, and employed Appellant to replace employees on leave. Under those circumstances, the Board dismissed the appeal, citing *Trotts v. Oregon State Hospital*, Case No. MA-9-95 (October 1995). Trombley v. EOTC, Case No. MA-20-96 (October 1996).

5.2.5 17 Cases which were dismissed for want of prosecution after Appellants failed to respond to requests of the administrative law judge for additional information: Western v. Vocational Rehabilitation Division, Case No. MA-14-93 (October 1993); Tarnay v. Oregon Department of Transportation, Case No. MA-9-94/classified service dismissal (August 1994); Tenderella v. Department of Corrections, Case No. MA-13-94/ classified service dismissal (September 1994); Young v. Office of Educational Policy and Planning, Case No. MA-22-94/classified employee appeal (September 1994); Kirsch v. Public Utility Commission, Case No. MA-30-94/classified service personnel action (September 1994); Hopkins v. Fairview Training Center, Case No. MA-10-93 (November 1994); Bassetti v. Children's Services Division, Case No. MA-31-94 (November 1994).

5.2.5 18 The Board dismissed the appeal of a removal from management service and dismissal for failure to respond to the administrative law judge's requests for information. The appeal was later reinstated by the Board on Appellant's motion, based on Appellant's representation that he was in the processing of moving at the time of the administrative law judge's inquiries, and had no fixed address. The Board later rendered a final decision affirming the removal and dismissal. Peterson v. Department of General Services, Case No. MA-9-93/management service removal/classified service dismissal (April 1993), ruling on reconsideration (May 1993), decision on the merits, (March 1994).

5.2.5 19 The Board requested Appellant to withdraw an appeal after being notified by the agency that the disciplinary actions at issue had been rescinded. When Appellant did not respond, the Board dismissed the appeals. Seufert v. Employment Division, Case Nos. 1231/1240 (November 1982).

5.3 Relationship to pending criminal prosecution

5.3 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

5.3 2 A management service employee requested that the appeal of his removal from management service be held in abeyance pending the outcome of related criminal proceedings. The Board dismissed the appeal for lack of prosecution after the appellant failed to respond to the ALJ's query about the status of the criminal case and the ALJ's subsequent warning that the appeal would be dismissed unless the appellant notified the ALJ that he was ready to proceed with his appeal. Monem v. Department of Corrections, Case No. MA-05-07 (November 2007).

Chapter 6—Affirmative Defenses

6.2 Bad faith employer actions

6.2 1 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to

precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

6.2 2 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

6.2 3 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

6.2 4 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals. The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here

are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting.

6.2 5 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

6.2 6 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

6.2 7 Appellant was removed from his management service position as part of a reorganization. He appealed, alleging that the agency acted in bad faith by not following its layoff policy. The Board set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons" under ORS 240.086(1). The court of appeals reversed, holding that ORS 240.086(1) did not apply to management service employees, and remanded the case to the Board to determine whether Appellant was laid off in violation of ORS 240.560. On remand, the Board dismissed the appeal, concluding

that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

6.2 8 Support services supervisor 2 appealed her removal from management service and restoration to a position in the classified service. She claimed that the removal was in bad faith because she had never been disciplined before the removal, she was not given any notice of performance deficiencies before the removal, and there was no progressive discipline before the removal. The Board found that the removal was justified based on the some of the proven charges, which showed that Appellant had failed to exercise good judgment in performance of her management service duties. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

6.4 Denial of charges

6.4 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

6.4 2 A management service employee appealed removal from management service and restoration to classified service for playing a practical joke on a co-worker and being deceitful in gaining approval from his superiors to play the joke. The Board concluded that the appellant's actions and behavior in planning and executing the practical joke caused a situation perceived by the victim as embarrassing, hostile, and intimidating in violation of the harassment-free workplace policy, but that the appellant had not been deceitful because he did not hide the reason behind the joke or how he intended to carry out the joke. Dismissing appellant's argument that the policy was vague, Board stated that management employees may be held to strict standards of behavior, and it is not

unreasonable to expect them to understand the policies they are required to enforce. The Board concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. The Board also found that the State did not give appellant an opportunity to respond to the allegations. The Board determined that some discipline was appropriate and ordered the appellant reinstated to his former position and made whole, minus a one-week suspension without pay, which was the same level of discipline imposed on the other managers. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

6.4 3 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

6.4 4 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice

and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

6.4 5 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

6.4 6 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's

decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

6.4 7 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

6.4 8 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

6.4 9 Appellant, a classified service fish and wildlife technician, appealed his dismissal from state service, alleging that the dismissal was improperly based on off-duty conduct. The main incident which caused the dismissal concerned a confrontation between Appellant and his neighbors in which the neighbors alleged that he shouted obscenities at them. Appellant denied the charges. The Board

found that the neighbors were more credible witnesses, and affirmed the dismissal. Lawson v. Department of Fish and Wildlife, Case Nos. MA-15/28-94 (July 1995).

6.4 10 Mental health supervising RN in the management service received a written reprimand for withholding information from her supervisor during an investigation conducted by the agency. Appellant denied that she withheld information; she claimed that she did not have the information sought by the agency's specific questions. The Board found that Appellant failed to disclose relevant information in response to the agency's inquiry, and that a letter of reprimand was an objectively reasonable response by the agency. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

6.4 11 Correctional captain was removed from his management service position and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. Appellant denied all the charges. The Board upheld the removal, finding that the agency's witnesses were more credible than Appellant, and that the charges were substantiated and justified removal. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

6.5 Discipline inconsistent with employer's prior practice

6.5 1 The Board concluded that a management service employee's removal was not objectively reasonable because other managers, who shared responsibility and culpability for the practical joke for which appellant was removed, received a lower level of discipline. The Board distinguished *Skillman v. Mental Health Division*, Case No. 1449 at 14 (March 1985), *AWOP*, 79 Or App 378, 718 P2d 382, *rev den*, 302 Or 36, 726 P2d 935 (1986) (where the appellant's failure to establish safeguards and his authorization of improper purchases were matters integral to the business office function and occurred with knowledge of a serious agency problem that he, as the fiscal manager, was specifically required to guard against) and *Ahlstrom v. Department of Corrections*, Case No. MA-17-99 (October 2001) (where given the appellant's responsibilities, he engaged in affirmative conduct that violated known department rules and policies.) In this case, the Board found that the victim's emotional response to the joke was unexpected and the appellant had no special managerial responsibility regarding the enforcement of the harassment policy; did not violate the harassment policy to a degree more than the others involved, and obtained the approval of the victim's supervisor before moving forward with the joke. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

6.5 2 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had

exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

6.5 3 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

6.5 4 Appellant, a classified service fish and wildlife technician, was given a pay reduction for failing to set an alarm system at the fish hatchery. He appealed the pay reduction, contending that other employees had either shut off the alarm system or failed to set it and had not been disciplined. The Board found that Appellant failed to prove that other employees had been treated differently and affirmed the pay reduction. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

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

6.6 1 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

6.6 2 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding

Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

6.6 3 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

6.6 4 Nurse manager appealed her removal from management service and the agency's refusal to let her work at home. Appellant was removed because a medical condition prevented her from coming to the work site to perform the duties of her position. She claimed that her condition was a disability and that the removal violated state and federal statutes prohibiting discrimination against disable persons. The Board, citing *Phillips v. Department of Revenue*, 23 Or App 748, 544 P2d 196 (1975), ruled that it lacked jurisdiction to decide the Appellant's discrimination claims. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

6.6 5 Revenue agent in the classified service was dismissed for falsifying records and wasting the state's resources in scheduling field trips. Appellant claimed that the agency discriminated against him for his health problems. He admitted the charged misconduct but argued that his health problems and medication he was taking should have been taken into account as mitigating circumstances. The Board did not find that the mitigating circumstances offered by Appellant altered its conclusion that the dismissal was objectively reasonable, because there was no evidence to prove that any of Appellant's ailments or medications would have caused him to engage in misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

6.7 Employer awareness of workplace problem (see also 4.3)

6.7 1 A management service employee appealed removal from management service and restoration to classified service for playing a practical joke on a co-worker and being deceitful in gaining approval from his superiors to play the joke. The Board concluded that the appellant's actions and behavior in planning and executing the practical joke caused a situation perceived by the victim as embarrassing, hostile, and intimidating in violation of the harassment-free workplace policy, but that the appellant had not been deceitful because he did not hide the reason behind the joke or how he intended to carry out the joke. Dismissing appellant's argument that the policy was vague, Board stated that management employees may be held to strict standards of behavior, and it is not unreasonable to expect them to understand the policies they are required to enforce. The Board concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. The Board also found that the State did not give appellant an opportunity to respond to the allegations. The Board determined that some discipline was appropriate and ordered the appellant reinstated to his former position and made whole, minus a one-week suspension without pay, which was the same level of discipline imposed on the other managers. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

6.7 2 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

6.7 3 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

6.7 4 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

6.7 5 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly.

These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

6.7 6 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. In his appeal, Appellant claimed that the dismissal was unwarranted because the agency was aware of his attendance problems and had not previously disciplined him. The Board found that, although the agency had tolerated without discipline a history of attendance problems, it had counseled Appellant informally and did not allow him to return to work on one occasion until he signed a "last chance" agreement which put him on notice of potential dismissal for further offenses. The Board upheld the removal from management service and also affirmed the dismissal from classified service. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

6.7 7 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board set aside the removal and dismissal, concluding that the agency had cause to remove Appellant from the management service for the first two charges, which were proven, but the agency's action in doing so was not that of a "reasonable employer." The Board determined that the State had failed to discipline Appellant in a timely manner: the agency had been aware of the first incident for a year and failed to act; the agency had previously told Appellant that the second incident was resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

6.7 8 Warehouse worker 3 was suspended and dismissed for giving a damaged bottle of liquor to the employee of the railroad company that delivered the liquor and for not reporting another employee who had given liquor to a railroad company worker. The Board upheld the suspension of Appellant but set aside the dismissal, because the agency knew (or should have known) of a long-standing practice of employees giving railroad company employees damaged bottles of liquor in hopes of holding down demurrage charges from the railroad company. Whiteaker v. Oregon Liquor Control Commission, Case Nos. 961/962 (September 1980)

6.10 Off-duty conduct not subject to discipline

6.10 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board concluded that

the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

6.10 2 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions,* Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

6.10 3 Fish and wildlife technician in the classified service was dismissed from state service. The incident which precipitated the dismissal was a confrontation between Appellant and his neighbors during Appellant's off-duty time. Appellant appealed, arguing that it was improper for the agency to base the dismissal on his off-duty actions. The Board found that, because Appellant lived in agency-owned housing, his expectation to be free from agency intervention in his off-duty conduct was diminished. In affirming the dismissal, the Board determined that Appellant's due process rights had not been violated and that his employment and disciplinary history were properly considered. Lawson v. Department of Fish and Wildlife, Case Nos. MA-15/28-94 (July 1995).

6.11 Physical or mental condition

6.11 1 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make

other arrangements to ensure the work got done. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

6.11 2 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

6.11 3 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

6.11 4 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several

conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

6.11 5 Nurse manager appealed her removal from management service and the agency's refusal to let her work at home. Appellant was removed because she did not go to the work site to perform the duties of her position. She claimed that she had a medical condition which was a disability and that the removal violated state and federal statutes prohibiting discrimination against disabled persons. The Board, citing *Phillips v. Department of Revenue*, 23 Or App 748, 544 P2d 196 (1975), ruled that it lacked jurisdiction to decide the Appellant's discrimination claims. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

6.11 6 Revenue agent in the classified service was dismissed for falsifying records and wasting the state's resources in scheduling field trips. Appellant admitted the charged misconduct but argued that his health condition and medication he was taking should have been considered as mitigating circumstances. The Board considered the nature of the admitted misconduct, Appellant's employment history, and the mitigating circumstances, and concluded that dismissal was objectively reasonable. The Board did not find that the mitigating circumstances offered by Appellant altered its conclusion because there was no evidence to prove that any of Appellant's ailments or medications would have caused him to engage in misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

6.12 Unlawful order (work now/grieve later doctrine)

6.12 1 Management service employee was reprimanded for failing to obey an order to meet with a subordinate. Appellant argued that the order essentially required him to give preferential treatment to the subordinate, in violation of State and federal law. The Board concluded that the order did not require Appellant to violate any laws but instead was given to require him to explain to the subordinate comments made in denying the subordinate's training request. Appeal dismissed. Riley v. Veterans Affairs Department, Case No. MA-11-00 (September 2001).

6.12 2 Campus service supervisor was given a reduction in pay for failing to effectively search for a client who left the campus and for having a visitor during work hours in violation of a directive from his superiors. Appellant claimed the directive about visitors was contrary to the agency's written policy and therefore invalid. The Board dismissed the appeal, noting that Appellant had failed to follow the "work now/grieve later" principle and was not excused from obeying the directive even if it was invalid. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

6.15 Other (classification new in 2001; includes only cases after that date)

6.15 1 In an appeal of a removal from management service, the State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. Appellant asserted that the State should be equitably estopped from asserting that she was an executive service employee because the State had previously called her a management service employee. The Board stated that a government agency may be estopped from asserting a claim inconsistent with a position it previously took. *Department of Transportation v. Hewitt Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995). Citing to *Day v. Advanced M&D Sales, Inc*., 336 Or 511, 520, 86 P3d 678 (2004), the Board set out the elements of equitable estoppel, which are (1) a false representation; (2) made with knowledge of the facts; (3) to a party who is ignorant of the truth; (4) with the intention that it be acted upon by the other party; and (5) the other party was induced to act upon it. The Board pointed out that for equitable estoppel to apply, the misrepresentation must be of a material fact, and not of a conclusion of law. The Board held that the State was not equitably estoppel from making its assertion because the issue of whether appellant is an executive service employee is a conclusion of law. The Board then determined that the State had failed to prove that the appellant was an executive service employee within the meaning of ORS 240.205(4) and OAR 105-10-000(24), because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

6.15 2 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

Chapter 7—Pre-hearing Practice

7.1 Depositions

7.1 1 ALJ properly denied Appellant's request for a subpoena to depose six individuals, under Board Rule 115-10-065, because Appellant did not show that the proposed deponents were ill, planned to be out of the area at the time of the hearing, or were otherwise unavailable for hearing. The Board stated that it "historically has denied requests for depositions, avoiding the time and expense of that pre-hearing practice. Instead, this Board requests and obtains the cooperation of counsel in voluntary

pre-hearing document exchanges and conferences. In addition, a pre-hearing order directs the parties to exchange exhibits and witness lists seven days before hearing. If, at hearing, a party is surprised at particular evidence, the party can request a set over to prepare a response." Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

7.1 2 Alternate hearing procedure agreed upon by parties: pre-hearing exchange of sworn affidavits with cross-examination of affiants during telephone hearing. (The Board noted that the Appellants, who had been laid off by PUC, resided in Klamath Falls.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case Nos. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

7.1 3 Labor relations manager appealed his removal from the management service. Before the hearing, Appellant sought to take depositions from several individuals for discovery purposes. The administrative law judge denied Appellant's requests based on OAR 115-10-065. The Board upheld the ruling, confirming that its rules only allow depositions for the purpose of perpetuating testimony from witnesses who would be unavailable at hearing. The Board dismissed Appellant's argument that the Administrative Procedures Act required it to allow depositions as a discovery tool. The removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

7.2 Subpoenas

7.2 1 In a management service employee appeal under ORS 240.570(2), the ALJ denied appellant's request to subpoena a high level manager to testify regarding the division's budget because the manager had not actively participated in appellant's removal and, as such, the manager's testimony would be cumulative and not based on his personal knowledge. The Board ruled that it was within the discretion of the ALJ to deny the request. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

7.2 2 Labor relations manager appealed his removal from the management service. Before the hearing, Appellant issued several subpoenas duces tecum. The agency filed motions to quash. The administrative law judge sustained the motions in part on the grounds that the material sought by the subpoenas was not relevant to the issues in the case and that the subpoenas were not reasonable in scope. *See* OAR 115-10-055. Appellant also subpoenaed the agency's lawyer as a witness. The agency filed a motion to quash the subpoena. The administrative law judge sustained the motion to quash, citing *OSEA v. The Dalles School District*, Case No. UP-35-88, 12 PECBR 88 (1990), in which the Board held that in order to call opposing counsel as a witness, a party must establish that the opposing counsel is a necessary witness and describe the testimony being sought from the opposing counsel. In affirming the removal, the Board affirmed the rulings. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

Chapter 8—Hearing

8.1 Date of hearing

8.1 1 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow his lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board ultimately determined that the appellant was aware of his supervisors' concerns, had failed to address them, and that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

8.1 2 In 2003, the legislature amended ORS 240.560(1) to provide: "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than [*10*] **30** days after the effective date of [*such*] **the** reduction, dismissal, suspension or demotion. **The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion.** [*Such*] **The board shall hear the** appeal [*shall be in writing and shall be heard by the board*] within 30 days after [*its receipt*] **the board receives the appeal, unless the parties to the hearing agree to a postponement.** The board shall furnish the division of the service concerned with a copy of the appeal in advance of the hearing."

8.1 3 Alternate hearing procedure agreed upon by parties: pre-hearing exchange of sworn affidavits with cross-examination of affiants during telephone hearing. (The Board noted that the Appellants, who had been laid off by PUC, resided in Klamath Falls.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case Nos. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

8.2 Bifurcation of hearing

8.2 1 Appellant filed an appeal over removal from management service. The State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. The appeal was bifurcated and in an interim order on jurisdiction, the Board determined that the State had failed to prove that the appellant was an executive service employee. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

8.3 Burden of going forward with evidence

8.3 1 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first

was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

8.3 2 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example*, ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

8.4 Burden of proof

8.4 1 Law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board

rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

8.4 2 Setting aside employee's removal from management service, the Board reviewed the case law regarding the State's burden of proof and the standard of review under ORS 240.570, stating: (1) the State has the burden of proving that its discipline complied with ORS 240.570(3), citing *Ahlstrom v. Department of Corrections*, Case No. MA-17-99 at 14 (October 2001), and the State meets this burden if its actions were "objectively reasonable," citing *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981), and *Morisette v. Children's Service Division*, Case No. 1410 at 23 (March 1983); (2) an objectively reasonable employer imposes sanctions proportionate to the offense; considers the employee's length and record of service; clearly defines performance expectations; clearly expresses performance expectations to employees; informs employees when performance standards are not being met; and clearly defines and follows progressive discipline, except for gross offenses; citing *Bellish v. Department of Human Services*, Case No. MA-23-03 at 8 (April 2004), and other cases; (3) a significant factor the Board considers is whether the employee "can no longer be an effective and trusted management service employee," citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984); and (4) management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

8.4 3 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applied to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board concluded that the State, which may "interpret and flesh out the policy in a reasonable fashion," had acted consistently with its prior interpretation and application of the layoff policy and reasonably interpreted the policy to allow an employee who is bumping into a position and the supervisor to determine if the employee is capable of performing the position's duties within 30 days. The Board found that the appellant failed to meet his burden of proving that the State's decision that the employee was qualified for the appellant's position was arbitrary. The Board also ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position for which he had originally agreed he was qualified. The Board also stated that even if the appellant had proven he was improperly laid off, he would not be entitled to monetary damages because he failed to mitigate his damages by turning down several suitable State positions. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

8.4 4 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the

standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

8.4 5 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

8.4 6 In the appeal of a management service employee's removal from management service and dismissal from classified service, the Board stated that it first determines whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. If the State proves any of the charges, the Board then applies the reasonable employer test twice, once to establish whether the State has carried its burden of justifying the removal from management service and a second time to determine if the State has

established that its action was taken "in good faith for cause." The Board held that a management service employee may be held to "strict standards of behavior, so long as these standards are not arbitrary or unreasonable," citing *Helfer v. Children's Services Division,* Case No. MA-1-91 (February 1992). An important consideration is the damage done to the relationship of trust between an employer and the employee. *Reynolds v. Department of Transportation,* Case No. 1430 (October 1984). The State need not prove all of the charges on which it relied in removing an employee from management service, citing *Ahlstrom v. State of Oregon, Department of Corrections,* Case No. MA-17-99 (October 2001).The State can dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee, citing *Smith v. Transportation Department,* Case No. MA-4-01 (2001) at 8. The Board held that the employer's burden in justifying a removal from management service is relatively minor, but in a dismissal, the employer must establish that its action was taken 'in good faith for cause, citing ORS 240.570(5), 240.555, 240.560(4), *Plank v. Department of Transportation*, Case No. MA-17-90 (1992) at 29, and *Peyton v. Oregon State Health Division*, Case No. MA-4-87 (January 1989), *order on recon* (February 1989). Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

8.4 7 Appellant filed an appeal over removal from management service. The State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. In the interim order on jurisdiction, the Board determined that the State had failed to prove that the appellant was an executive service employee within the meaning of ORS 240.205(4) and OAR 105-10-000(24), because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute. Citing *Arlington Education Association v. Arlington School District*, 177 Or App 658, 668-69, 34 P3d 1197 (2001), *rev den*, 333 Or 399, 42 P3d 1243, 1244 (2002), the Board stated that it would not speculate about whether the director gave the approval because its review is confined to the factual record, which includes evidence developed by the parties at hearing, stipulations of the parties, and matters subject to official notice. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

8.4 8 In an appeal of a removal from management service, the State asserted that the Board lacked jurisdiction because the appellant was an executive service employee within ORS 240.205. ORS 240.205 provides that an executive service employee must be either a "deputy" or a "principal assistant." Under state policy, "executive service" is an amalgam of certain positions in the exempt service and the unclassified service. The policy also identifies statutory subgroups of employees who comprise the unclassified service as the components of the executive service. The Board held that the appellant was not a "deputy" because she did not report directly to any listed executive or administrative officers, did not exercise the officer's authority when the officer was absent, and the organizational chart placed appellant at least one step below the level of deputy because she reported to a deputy assistant director. Appellant was not a "principal assistant" because there was no evidence that such designation, if made, was ever approved by the DAS director or designee, which is not a mere technicality but a statutory requirement. Citing to ORS 174.101 and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), the Board stated that when construing a statute, it may not omit language that the legislature has included. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

8.4 9 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

8.4 10 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

8.4 11 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA,

and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

8.4 12 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

8.4 13 *Prima facie case.* The Board stated, in footnote 5: "A 'prima facie' case is defined as: 'Such as will prevail until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to [the] contrary is disregarded.' *Black's Law Dictionary* (West abridged sixth edition 1991)." (Order at 6.) Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

8.4 14 Appellant challenged his removal from management service during a reorganization, contending that the agency had not followed its layoff policy. In reconsidering it decision to set aside the removal, the Board ruled that Appellant had satisfied his burden of proof by showing that the layoff policy applied to his removal and that the agency had not considered the policy. The Board held that it was up to the agency to establish that the outcome would not have been any different if the policy had been followed. The court of appeals reversed, holding that the Board applied the wrong standard in reviewing the removal under ORS 240.086(1). On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4). Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

8.5 Burden of proving affirmative defenses

8.5 1 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not

entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

8.5 2 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

8.6 Motions (see also Chapter 16)

8.6 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board ultimately concluded that the State acted reasonably when it dismissed the appellant. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

8.6 2 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board denied the appellant's request to reopen the record after the recommended order was issued to present evidence that the employee who had bumped into his position was subsequently removed, ruling that it was the circumstances that existed at the time the State's decision was made that were relevant. The Board also denied the appellant's motion to clarify and/or file new objections after oral argument ruling that new objections at such a late date would be untimely and the appellant had not shown good cause for an extension of time. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

8.6 3 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

8.6 4 The Board granted the State's motion to disregard the reference to an exhibit in the Union's brief because the Union is not entitled to challenge the arbitrator's factual findings under ORS 240.086(2). Department of Transportation v. SEIU, Local 503, Case No. AR-1-06, 21 PECBR 838 (May 2007).

8.6 5 After the State appealed the Board's decision that it had unlawfully removed the appellant from management service under ORS 240.570(2), the parties settled the matter. Pursuant to the settlement, the State filed a motion with the Board to vacate the order, which was joined in by the appellant. Citing *City of Eugene v. PERB*, 341 Or 120, 137 P3d 1288 (2006), the Board held that when the State settled the matter, it voluntarily relinquished its legal remedy and thereby surrendered its claim to equitable relief. The Board stated that vacatur was not appropriate because "[i]t is an extraordinary remedy to which a party must show equitable entitlement." Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 31, 2005), Ruling on Motion to Stay (March 13, 2006), recons (March 2007).

8.6 6 In a management service employee appeal under ORS 240.570(2), the Board ruled that the ALJ had properly (1) denied appellant's attempt to introduce evidence that the State had violated the Oregon and Federal Family Medical Leave Acts and Oregon statutes regarding violence in the workplace because the Board does not have jurisdiction over these claims; (2) denied appellant's motion for copies of other employee's personnel files and information related to meetings occurring

after appellant's removal based on relevancy; and (3) refused to receive into evidence handwritten notes of a telephone conversation as not properly authenticated where the appellant had been given the notes by someone else, she did not know the identities of the speakers, and the notes appeared to be written with two different pens. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

8.6 7 In a management service employee appeal under ORS 240.570(2), appellant filed a motion for a mishearing because the State's counsel had talked to individuals on the appellant's witness list without her knowledge or consent. The Board ruled that the motion was properly denied since appellant had not presented any authority or evidence that the State had acted improperly. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

8.6 8 After the Board ordered the reinstatement of a management service employee to the classified position which she had previously held, the State filed a motion for reconsideration regarding the back pay award. The State argued that the back pay award should be reduced because the appellant had received unemployment benefits and had been removed from the workforce due to attendance at school. The Board denied the motion because there was no evidence in the record regarding either matter. The Board stated that such issues would be more properly pursued during compliance proceedings before the Board, at which point the parties could introduce these facts as evidence and argue the effects of these facts on the back pay amount. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

8.6 9 In a petition for review of an arbitrator's award, the Board denied the State's motion to stay the arbitrator's reimbursement remedy pending the outcome of its petition for review. The Board held that it does not have statutory authority under ORS 240.086(2) to enjoin enforcement of arbitration awards. Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA) v. SEIU, Local 503, Case No. AR-1-05, 21 PECBR 307 (April 2006).

8.6 10 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v.

Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

8.6 11 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

8.6 12 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

8.6 13 ALJ properly denied Appellant's motion for a postponement (submitted at hearing) where the motion was presented to enable Appellant to have time to subpoena witnesses. The ALJ ruled that Appellant had failed to exercise due diligence in securing the attendance of his witnesses and obtaining the necessary subpoenas. Hauck v. Housing and Community Services Department, Case No. MA-1-03 (December 2003).

8.6 14 Labor relations manager appealed his removal from management service. Before the hearing, Appellant filed a motion in limine seeking to prevent the agency from presenting any evidence except that relied on in deciding the removal. The motion was denied for the reason that other evidence might be relevant to the question of whether the removal was reasonable even though it was

not considered as a basis for removal. Appellant's motion to strike testimony of his former supervisor about his relationships with co-workers was granted because the testimony was not relevant to the issues on which the removal was based. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

8.6 15 Appellant's motion at oral argument to remand the case to the administrative law judge to receive additional evidence was denied where the evidence was available to Appellant at the time of hearing. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

8.7 Post-hearing briefs

8.7 1 Labor relations manager appealed his removal from management service. On the date post-hearing briefs were due, Appellant attempted to fax his brief to the Board. After the Board received the first nine pages, Appellant called and said that there had been an equipment malfunction and he asked for leave to file the rest of the brief late. The agency objected. The Board allowed the late filing, because Appellant had started the transmission in a timely fashion and completed it on the due date, although after 5 p.m. In affirming the removal, the Board held that the agency's rights were not prejudiced by the late filing. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

8.8 Recommended Order

8.8 1 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

8.9 Objections to recommended order

8.9 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board denied the appellant's request to reopen the record after the recommended order

was issued to present evidence that the employee who had bumped into his position was subsequently removed, ruling that it was the circumstances that existed at the time the State's decision was made that were relevant. The Board also denied the appellant's motion to clarify and/or file new objections after oral argument ruling that new objections at such a late date would be untimely and the appellant had not shown good cause for an extension of time. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

8.9 2 The ALJ's recommended order dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The appellant filed timely written objections only to the ALJ's conclusion that she had not conducted sufficient drive tests, but then focused on the conclusions regarding her failure to perform counter work during oral argument. The Board held that since the appellant had exceeded the scope of her written objections, it would normally impose the sanction of refusing to consider objections which did not meet the timeliness requirements of OAR 115-45-040(2), citing *Portland Federation of Teachers v. Portland Public School District No. 1 and Oregon School Employees Association*, Case No. C-76-78, 4 PECBR 2290, 2293 (1979); and *Teamsters Local Union 670 v. Linn County Parks and Recreation Department*, Case No. C-40-80, 5 PECBR 3081 (1980). However, here the Board decided that since it had found that the State acted reasonably in reprimanding appellant for failing to perform the drive tests, it would not address the counter-work issue at all. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

Chapter 9—Board and Appellate Court Review

9.1 Board review and order; reopening the record

9.1 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board denied the appellant's request to reopen the record after the recommended order was issued to present evidence that the employee who had bumped into his position was subsequently removed, ruling that it was the circumstances that existed at the time the State's decision was made that were relevant. The Board also denied the appellant's motion to clarify and/or file new objections after oral argument ruling that new objections at such a late date would be untimely and the appellant had not shown good cause for an extension of time. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

9.1 2 After the Board ordered the reinstatement of a management service employee to the classified position which she had previously held, the State filed a motion for reconsideration regarding the back pay award. The State argued that the back pay award should be reduced because the appellant had received unemployment benefits and had been removed from the workforce due to attendance at school. The Board denied the motion because there was no evidence in the record regarding either matter. The Board stated that such issues would be more properly pursued during compliance proceedings before the Board, at which point the parties could introduce these facts as evidence and argue the effects of these facts on the back pay amount. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

9.1 3 The ALJ's recommended order dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The appellant filed timely written objections only to the ALJ's conclusion that she had not conducted sufficient drive tests, but then focused on the conclusions regarding her failure to perform counter work during oral argument. The Board held that since the appellant had exceeded the scope of her written objections, it would normally impose the sanction of refusing to consider objections which did not meet the timeliness requirements of OAR 115-45-040(2), citing *Portland Federation of Teachers v. Portland Public School District No. 1 and Oregon School Employees Association*, Case No. C-76-78, 4 PECBR 2290, 2293 (1979); and *Teamsters Local Union 670 v. Linn County Parks and Recreation Department*, Case No. C-40-80, 5 PECBR 3081 (1980). However, here the Board decided that since it had found that the State acted reasonably in reprimanding appellant for failing to perform the drive tests, it would not address the counter-work issue at all. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

9.1 4 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

9.1 5 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's

reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

9.1 6 ALJ properly denied Appellant's request to reopen the record to receive a chart, where testimony would be required to explain the chart and Appellant had the opportunity to—but did not—request the information before or during the hearing. Hauck v. Housing and Community Services Department, Case No. MA-1-03 (December 2003).

9.1 7 "In ruling on a motion to reopen the record to receive additional evidence, we consider: (1) whether the evidence is material to the issues and was unavailable at hearing; or (2) whether there was some other good and substantial reason that the evidence was not presented at hearing." After hearing, Appellant sought to offer an audio tape recording of her pre-dismissal hearing, apparently to bolster the testimony she presented at the Board's hearing. The Board affirmed the ALJ's denial of the motion, stating: "A desire to bolster one's testimony does not constitute a good and substantial reason to reopen a hearing record." Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

9.1 8 After filing objections to the recommended order in his appeal, Appellant withdrew the appeal. The appeal was dismissed. Swartz v. Department of Environmental Quality, Case No. 1345 (April 1982).

9.2 Stay of order pending appellate court review

9.2 1 The State filed a motion to stay Board's order reinstating a management employee pending resolution of an appeal. The Board found that the State had established a "colorable claim of error" since there was a reasoned dissent to the order of reinstatement. However, the Board found that the State failed to make a showing of "irreparable injury" under ORS 183.482(3) because current employees are often displaced when reinstatement is ordered and an obligation to pay back pay is not irreparable harm. The Board also stated that the appellant had not been ordered reinstated into her prior position because it had been absorbed in the reorganization, but since the agency is in a perpetual state of reorganization allowing the reorganization to preclude reinstatement would "result in the evisceration of the remedies provided for in the" SPRL. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

9.2 2 The Board dismissed the agency's petition seeking review of an arbitration award. The agency filed a motion to stay the Board's order pending appeal to the court of appeals. The Board found that the agency made a "colorable claim of error," but failed to establish that it would suffer "irreparable injury" without a stay. The motion was denied. Department of Corrections v. AFSCME Council 75, Local 2623, Case No. AR-1-92 (September 1992), ruling on motion (February 1993), appeal withdrawn (March 1993).

9.2 3 After denying the agency's motion for reconsideration, the Board denied the agency's motion to stay its order pending judicial review. The Board held that the agency failed to show that it would suffer irreparable injury if the order was not stayed. Whiteaker v. Oregon Liquor Control

Commission, Case Nos. 961/972 (May 1980), reconsideration denied (July 1980), stay denied (September 1980).

9.3 Review by appellate courts

9.3 1 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

9.3 2 The Court of Appeals dismissed the appeal of a Board decision as moot and vacated the Board's order. The Board had ruled that an arbitrator's "interim award" (a procedural ruling) is not subject to the Board's discretionary review, under ORS 240.086(2). The Board found that a state police officer engaged in certain conduct; the State terminated the officer; prosecutors filed criminal charges against him in circuit court; the judge dismissed two of the charges; and the district attorney appealed to the court of appeals. The Association processed a grievance to arbitration and requested the arbitrator to postpone the hearing, to preserve the officer's Fifth Amendment rights, pending resolution of the criminal case; the State opposed that motion. The arbitrator convened a hearing and heard all offered testimony, except that from the officer. After the officer agreed to two conditions for a stay of the hearing (terms regarding back pay and reinstatement), the arbitrator adjourned the hearing, with certain provisos. In its discussion, first, the Board rejected the Association's argument that the Board has jurisdiction to review only "final" awards, concluding that it has the authority to review nonfinal awards but deciding to "exercise our discretion to decline to review interim rulings or awards, except in rare or unusual circumstances not present in this case." Second, the Board rejected the State's contention that the arbitrator exceeded his authority by ordering a stay that would

result in a potentially-long delay that, the State asserted, would make the arbitrator unable to render a valid award: "Given the existence of a record in the arbitration hearing, we reject this State argument." Third, the Board stated that the arbitrator "narrowly and rationally limited the duration of the adjournment * * * [and] imposed conditions to minimize potential harm to the State resulting from the delay." As a result, the Board concluded that the circumstances did not warrant an assertion of jurisdiction and review of the arbitrator's interim ruling. (In footnote 2, the Board also noted that ORS 243.706(3)(c) of the PECBA provides that an arbitrator may adjourn hearings "from day to day, or for a longer time * * *.") State Police Department and Department of Administrative Services v. OSPOA, Case No. AR-2-00 (July 2000), 18 PECBR 711, recons (November 2000), *appeal dismissed as moot and Board order vacated (December 2002).*

9.3.3 The Board ordered the agency to reinstate Appellant to his management service position, make him whole for lost wages and benefits, and to apply its own rule concerning layoff to Appellant. The court of appeals reversed, holding that the Board incorrectly applied the ORS 240.086(1) "contrary to law or rule" standard to a management service appeal and that the proper standard was the ORS 240.560(4) "in good faith for cause" standard. On remand, the Board dismissed the appeal. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

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

10.2.1 Dismissal

10.2.1 1 Appellant filed an appeal alleging that she was constructively discharged. The agency contended that Appellant had voluntarily resigned, based on a personnel rule providing that an absence without approved leave of five consecutive work days would be deemed a resignation. The Board agreed and dismissed the appeal. Merrill v. Adult and Family Services, Case No. 1260/constructive discharge (March 1981).

10.2.1 2 Warehouse worker 3 was suspended and dismissed for giving a damaged bottle of liquor to the employee of the railroad company that delivered the liquor and for not reporting another employee who had given liquor to a railroad company worker. The Board upheld the suspension of Appellant but set aside the dismissal, because the agency knew (or should have known) of a long-standing practice of employees giving railroad company employees damaged bottles of liquor in hopes of holding down demurrage charges from the railroad company. Whiteaker v. Oregon Liquor Control Commission, Case Nos. 961/962 (September 1980).

10.2.1 3 Psychiatric aide 1 was suspended and dismissed for abusing a resident by placing him in a cold shower. The Board upheld the suspension and dismissal, finding that Appellant's conduct constituted resident abuse, that Appellant was aware of the agency's resident abuse policy, that Appellant's conduct was misconduct that warranted dismissal, and that there were no mitigating circumstances. Brady v. Fairview Training Center, Case Nos. 1051/1087 (July 1980).

10.2.2 Constructive discharge

10.2.2 1 Appellant failed to report to work and was dismissed. The Board dismissed her appeal of a "constructive discharge," ruling that the agency considered her to have resigned under the applicable personnel rule, which provided that an absence without approved leave of five consecutive work days would be deemed a resignation. The Board noted that it no jurisdiction to consider appeal of a resignation under ORS 240.560. Merrill v. Adult and Family Services, Case No. 1260 (March 1981).

10.2.5 Suspension

10.2.5 1 Warehouse worker 3 was suspended and dismissed for giving a damaged bottle of liquor to the employee of the railroad company that delivered the liquor and for not reporting another employee who had given liquor to a railroad company worker. The Board upheld the suspension of Appellant but set aside the dismissal, because the agency knew (or should have known) of a long-standing practice of employees giving railroad company employees damaged bottles of liquor in hopes of holding down demurrage charges from the railroad company. Whiteaker v. Oregon Liquor Control Commission, Case Nos. 961/962 (September 1980).

10.2.5 2 Clerical specialist appealed her suspension for insubordination. She was suspended for refusing to discuss a new check depositing procedure with her supervisor and refusing to attend a meeting with her supervisor to discuss the depositing procedure and other issues. The Board upheld the suspension, concluding that Appellant had been insubordinate. Potts v. Adult and Family Services Division, Case No. 1014 (August 1980).

10.2.5 3 Psychiatric aide 1 was suspended and dismissed for abusing a resident by placing him in a cold shower. The Board upheld the suspension and dismissal, finding that Appellant's conduct constituted resident abuse, that Appellant was aware of the agency's resident abuse policy, that Appellant's conduct was misconduct that warranted dismissal, and that there were no mitigating circumstances. Brady v. Fairview Training Center, Case Nos. 1051/1087/ suspension and dismissal (July 1980).

10.2.10 Allocation of position

10.2.10 1 Supervising safety representative sought reclassification of his position to a program executive 2. The Board noted that its role in classification cases was limited to determining whether there was a reasonable basis for the classification decision. The Board dismissed the appeal, finding based on the duties of the position and the wording of the class specifications that there was a reasonable basis for the agency's decision regarding Appellant's job. Nygaard v. Workers' Compensation Department, Case No. 1122 (November 1980).

10.2.16 Implied resignation

10.2.16 1 Appellant filed an appeal alleging that she was constructively discharged. The agency contended that she had voluntarily resigned, based on a personnel rule providing that an absence without approved leave of five consecutive work days would be deemed a resignation. The Board agreed and dismissed the appeal. Merrill v. Adult and Family Services, Case No. 1260 (March 1981).

10.2.18 Performance appraisal

10.2.18 1 Fiscal auditor 3 appealed an unsatisfactory performance appraisal rating score. The Board held that, without some notice of deficiency during the rating period, an employee cannot be given a less-than-satisfactory rating. The Board found, however, that Appellant had been given adequate notice that his work was not meeting minimum expectations, and dismissed the appeal. Norbeck v. Mental Health Division et al., Case No. 1359 (March 1982); affirmed on reconsideration (May 1982).

10.2.20 Other personnel actions

10.2.20 1 Appellant appealed his classification by the State as "representable" rather than excluded from representation under the collective bargaining law. The Board dismissed the appeal, concluding that it had no jurisdiction under Chapters 240 or 243 to review the State's action. O'Brien v. Department of Commerce and Executive Department, Case No. 1111 (July 1980).

10.3 Appropriateness of personnel action

10.3 1 Warehouse worker 3 was suspended and dismissed for giving a damaged bottle of liquor to the employee of the railroad company that delivered the liquor and for not reporting another employee who had given liquor to a railroad company worker. The Board upheld the suspension of Appellant but set aside the dismissal, finding that there were mitigating circumstances: the appellant's conduct was consistent with a well-established practice; he believed he was acting in the agency's interests; there was no rule prohibiting his actions; and he did not gain personally by his conduct. Whiteaker v. Oregon Liquor Control Commission, Case Nos. 961/962 (September 1980).

10.3 2 Clerical specialist appealed her suspension for insubordination for refusing to discuss a new check depositing procedure with her supervisor, and refusing to attend a meeting with her supervisor to discuss the depositing procedure and other issues. The Board upheld the suspension, concluding that Appellant had been insubordinate. Potts v. Adult and Family Services Division, Case No. 1014 (August 1980).

10.3 3 Psychiatric aide 1 was suspended and dismissed for abusing a resident by placing him in a cold shower. Appellant denied that his conduct was resident abuse. The Board held that the conduct was resident abuse and that resident abuse justified dismissal. The discipline was affirmed. Brady v. Fairview Training Center, Case Nos. 1051/1087 (July 1980).

Chapter 11—Classified Employees' Appeals: Employees Not Included in Bargaining Unit

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

11.1 1 Office specialist 1, a classified service employee was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial; (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. The Board applied the "reasonable employer" test and dismissed the appeal: "[t]he errors which form the basis for Wilson's dismissal occurred after

a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." The Board concluded that dismissal was reasonable, despite Appellant's more than 30 years of service to the State, where the State had made "repeated efforts" to assist Appellant in improving her performance and dismissed her only after it was clear she could not correct her deficiencies. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

11.1 2 Custodial services supervisor appealed his removal from management service and dismissal from classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3). The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct," based on Appellant's proven record of excessive absences and tardiness, lies to his supervisor about his intention to report to work, and failure to notify his supervisor about his absences. The Board applied the reasonable employer test twice, once to the removal from management service and once to the dismissal from classified service, because the cause sufficient to support a management service removal may not be enough to support a classified service dismissal. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

11.2 Personnel actions

11.2.1 Dismissal

11.2.1 1 An employee in a classified position 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). Abrego v. Department of Human Services, Case No. MA-14-07 (October 2007).

11.2.1 2 A classified employee, who had recently become represented by SEIU, appealed his dismissal under SPRL because SEIU and the State had agreed to a grievance procedure which took effect 5 days after his termination. The Board dismissed the appeal for lack of jurisdiction, stating that under ORS 240.086(1) it only has authority to review "any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit." The Board noted that in *Oregon AFSCME Council 75, AFL-CIO, and Tender v. State of Oregon, Department of Environmental Quality*, Case No. UP-131-86, 10 PECBR 287 (1987), it had found that the State violated ORS 243.672(1)(e) because the State changed the *status quo* established by the SPRL when it dismissed an employee in similar circumstances to the appellant. Manion v. Department of Fish and Wildlife, Case No. MA-26-03 (June 2004), AWOP, 201 Or App 589, 121 P3d 23 (2005).

11.2.1 3 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as

the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

11.2.1 4 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

11.2.1 5 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

11.2.1 6 *Classified service termination appeal*. Respondent removed Appellant from management service and dismissed her from classified service by letter dated December 2, 1997. The letter stated that, to contest the action, Appellant was required to file a written appeal to the Department director within 15 days of the effective date of the action. Appellant did so, and the director denied the appeal. On January 12, 1998, Appellant appealed to the Board. Regarding the *classified service termination* appeal, the Board noted that ORS 240.560 and Board Rule 115-45-010(2) require such appeals to be filed "no later than 10 days after the effective date of such [dismissal] action." Appellant presented two arguments that the classified appeal was timely. First, she argued that she had followed the timelines specified in the Department's December 2 letter. The Board stated that the Department's letter "incorrectly stated that [Appellant] had 15 days in which to appeal the [classified service] termination." (Order at 4.) The Board rejected Appellant's argument, stating that to rule the classified service appeal timely "would be contrary to law and Board rule." (Order at 4.) Second, Appellant argued that the Department actually had considered her appeal, which meant that the action was not final (and "effective") until the director issued a decision on the appeal. The Board rejected that argument, stating that an action is "effective" on the date when the employer changes the employee's employment status. In this case, that date was December 2, and Appellant filed her appeal more than 10 days after that date. Appeal dismissed. As to the *management service removal* appeal, the Board initially ruled that it was timely and remanded it to an ALJ for hearing. The Board stated that the management service appeal had been filed within the 15-day period specified in Board Rule 115-45-023, which provided that such filings were to occur "no later than 15 days after receiving written notification of the final decision of the agency head." (See companion entries in sections 1.3, 12.3.1, and 12.3.8.) In her October 1998 dissent, Member Whalen argued that the Department "improperly characterized Smith's termination from state service as involving two distinct personnel actions" (Order at 9) and that the termination "is properly viewed as a single personnel action—dismissal—because of her status in state service" and the terms of ORS 240.570(5). (Order at 10.) Member Whalen also argued that principles of estoppel rendered timely the classified service dismissal appeal. As a result, Member Whalen stated that the appeal was timely and warranted a hearing. Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

11.2.1 7 Revenue agent in the classified service was dismissed for falsifying records and wasting agency resources in scheduling field trips. After considering the nature of Appellant's misconduct (which he admitted), his employment history and the seriousness of the charges, the Board concluded that dismissal was objectively reasonable. The Board did not find that the mitigating circumstances offered by Appellant—his poor health and the effects of medications he was taking—altered its conclusion, because there was no evidence to prove that any of Appellant's ailments or medications would have caused him to engage in misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

11.2.1 8 Fish and wildlife technician was dismissed from his position in the classified service for an off-duty confrontation with his neighbors. The Board affirmed the dismissal, ruling that the agency could legitimately discipline Appellant for off-duty conduct because the he lived in housing owned by the agency. The Board also held that his due process rights had not been violated and that the

agency properly considered his prior disciplinary history. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

11.2.1 9 Office specialist 1, a classified service employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial; (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. The Board applied the "reasonable employer" test and dismissed the appeal: "[t]he errors which form the basis for Wilson's dismissal occurred after a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." The Board found that dismissal was reasonable, despite Appellant's more than 30 years of service to the State, where the State had made "repeated efforts" to assist Appellant in improving her performance and dismissed her only after it was clear she could not correct her deficiencies. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

11.2.1 10 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3) and affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." The Board concluded that Appellant's proven record of excessive absences and tardiness constituted "inefficiency," and Appellant's lies to his supervisor about his intention to report to work and failure to notify his supervisor about his absences were acts of intentional wrongdoing that constituted "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

11.2.1 11 Office assistant 2 was dismissed for various performance problems, including customer billing errors totaling $9,000, failure to complete an equipment inventory, repeated typographical errors, and misrouting mail. She had been reprimanded and demoted for related performance problems before the dismissal. The Board, applying the reasonable employer test, concluded that the agency had proved that Appellant was guilty of the billing error, and that the billing error alone was sufficient grounds to sustain the dismissal. Because that error was serious enough to warrant dismissal, the Board decided it was not necessary to consider the other charges against Appellant. The Board also ruled that Appellant's due process claims concerning an earlier demotion were untimely because she had not appealed the demotion. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

11.2.3 Trial service removal

11.2.3 1 A classified employee represented by AFSCME appealed removal from trial service. The parties' collective bargaining agreement provided that trial service removals were not subject to the contract's dispute resolution process. Citing *Thorson v. Department of Human Services*, Case No. MA-15-04 (February 2005), the Board dismissed the appeal for lack of jurisdiction because 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. Deglow v. Real Estate Agency, Case No. MA-9-06 (November 2006).

11.2.3 2 An office specialist, who was a member of an SEIU represented bargaining unit, appealed her removal from trial service under the SPRL because the SEIU/State collective bargaining agreement provided that trial service removals were not subject to the grievance procedure. The

Board dismissed the appeal for lack of jurisdiction stating that it does not have authority under ORS 240.086 to review personnel actions affecting an employee who is a member of a certified or recognized bargaining unit. Thorson v. Department of Human Services, Medford Child Welfare Office, Case No. MA-15-04 (February 2005).

11.2.3 3 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

11.2.3 4 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example*, ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

11.2.3 5 Information resource system administrator, in the classified service, was removed from trial service and appealed, alleging violation of ORS 240.410. After ruling that Appellant had the burden of proof and going forward, the Board found that: Appellant's position required him to work cooperatively on a team; he made comments to co-workers that they thought were condescending, mocking, or demeaning; his inability to perform some tasks caused management to conclude that he was weak in required skills; and management believed that team members did not want to work with him. The Board stated that it will not set aside a trial service removal, under ORS 240.410, if it finds

any rational basis to support an employer's good faith decision to terminate. The Board observed that Appellant "was unable to identify and follow the manner in which the Department team performed its work, and he alienated members of the team with his comments and working style." Those factors, the Board concluded, "provided a rational basis for [the State] to conclude [Appellant] was 'unable or unwilling to perform duties satisfactorily.' ORS 240.410." Concluding that there was no basis to set the removal aside, the Board dismissed the appeal. Fritz v. Administrative Services Department, IRMD GGDC, Case No. MA-2-02 (September 2002).

11.2.6 Reduction in pay

11.2.6 1 Fish and wildlife technician in the classified service was given a pay reduction for failing to set an alarm system at the fish hatchery. Appellant acknowledged that he had not set the alarm and that setting the alarm was his responsibility but contended that the agency should not have disciplined him because there was no written policy on the alarm system and other employees had not been disciplined for similar offenses. The Board affirmed the reduction, concluding that the lack of written policy was no excuse, given Appellant's experience. The Board also found that Appellant failed to prove that other employees had been treated differently for similar offenses. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

11.2.7 Reprimand

11.2.7 1 The Board dismissed the appeal of a reprimand by a classified employee for failure to state a claim and for lack of prosecution, citing *Young v. Office of Educational Policy and Planning*, Case No. MA-22-94 (September 1994). The Board found that the appellant failed to include facts that would show that the State's actions were arbitrary, in violation of law, or taken for political reasons as provided under ORS 240.086 and failed to respond to a warning from the ALJ that the appeal would be dismissed unless it was amended to include the requisite allegations. McKinney v. Department of Transportation, Case No. MA-12-06 (December 2006).

11.2.7 2 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

11.2.8 Transfer and assignment

11.2.8 1 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or

judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

11.2.8 2 When the legislature transferred a *program* (but not the *employees*) from PUC to DOT (1995 Or Laws ch. 733), PUC laid off Appellants and DOT did not hire them. The Board determined that it did not have jurisdiction over DOT's decision (see entry in section 1.13). As to the layoff, the Board held that PUC's actions were not arbitrary or contrary to law or rule and did not violate ORS 240.086(1). The Board found that the employees were laid off due to a reorganization which reduced the PUC work force; the selection process established by PUC and DOT was not arbitrary; and the record did not indicate that PUC and DOT considered any false information about Appellants. The Board stated that "it was rational [for those agencies] to look at employee performance issues to evaluate which employees" (Order at 15.) DOT should hire. The layoff, the Board decided, "violated no statutory provision, nor was it arbitrary. It was the logical result of a rational layoff process." (Order at 16.) In dissent, Member Whalen stated that, "although Appellants' termination took place pursuant to a transfer of functions, it was akin to a dismissal." (Order at 23.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

11.2.8 3 Classified employee alleged that PUC had failed to transfer him to DOT, in violation of ORS 240.086(1). (Senate Bill 1149 (1995) mandated the transfer of PUC *positions*, but not necessarily *employees*, to DOT.) The Board reviewed ORS 236.610, which provided that public employees shall not "be deprived of employment solely because the duties of employment have been assumed or acquired by *another* public employer * * *." (Emphasis added.) The Board concluded that the statute "was intended to address the transfer of positions from one *political jurisdiction* to another." (Order at 13.) In doing so, the Board determined that PUC and DOT are agencies of the same employer, the State of Oregon, so the transfer statute was inapplicable. The Board also rejected Appellant's four arguments that the failure to transfer was arbitrary or contrary to law. *(1) Alleged promise of employment*: (a) while DOT made some statements, it did not make any "unequivocal promises to transfer" him from PUC; (b) the statements of members of a transition steering committee, composed of DOT and DAS personnel, were not binding on Respondent (and only DOT had the authority to transfer Appellant); and © while the director of PUC said that employees without performance problems would become employed by DOT, DOT determined that Appellant *had* experienced performance problems. *(2) PUC retention of outdated appraisals*: Appellant also contended that PUC disregarded its practice and retained outdated performance appraisals in his file, which DOT considered in deciding not to transfer him; however, the assigned DOT reviewer established that she had considered only the files that were appropriately included in Appellant's file. *(3) Refusal of transfer to lower-level positions*. Appellant sought employment in lower-level positions that were to be transferred to DOT. Because that transfer was imminent, the Board decided that PUC had not acted irrationally in deferring that employment decision to DOT. *(4) Age discrimination*. Based on *Phillips v. Department of Revenue*, 23 Or App 748 (1975), the Board held that it did not have jurisdiction to decide the claim that the State's failure to transfer Appellant was because of his age (52). Appeal dismissed. Reynolds v. PUC, Case No. MA-23-95 (November 1996).

11.2.9 Layoff

11.2.9 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applied to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board concluded that the State, which may "interpret and flesh out the policy in a reasonable fashion," had acted consistently with its prior interpretation and application of the layoff policy and reasonably interpreted the policy to allow an employee who is bumping into a position and the supervisor to determine if the employee is capable of performing the position's duties within 30 days. The Board found that the appellant failed to meet his burden of proving that the State's decision that the employee was qualified for the appellant's position was arbitrary. The Board also ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position for which he had originally agreed he was qualified. The Board also stated that even if the appellant had proven he was improperly laid off, he would not be entitled to monetary damages because he failed to mitigate his damages by turning down several suitable State positions. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

11.2.9 2 When the legislature transferred a *program* (but not the *employees*) from PUC to DOT (1995 Or Laws ch. 733), PUC laid off Appellants and DOT did not hire them. The Board determined that it did not have jurisdiction over DOT's decision (see entry in section 1.13). As to the layoff, the Board held that PUC's actions were not arbitrary or contrary to law or rule and did not violate ORS 240.086(1). The Board found that the employees were laid off due to a reorganization which reduced the PUC work force; the selection process established by PUC and DOT was not arbitrary; and the record did not indicate that PUC and DOT considered any false information about Appellants. The Board stated that "it was rational [for those agencies] to look at employee performance issues to evaluate which employees" DOT should hire. (Order at 15.) The layoff, the Board decided, "violated no statutory provision, nor was it arbitrary. It was the logical result of a rational layoff process." (Order at 16.) In dissent, Member Whalen stated that, "although Appellants' termination took place pursuant to a transfer of functions, it was akin to a dismissal." (Order at 23.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

11.2.10 Classification/allocation of position

11.2.10 1 Program Representative 2 (salary range 26) appealed the State's allocation of his position to the Compliance Specialist 2 (salary range 25) classification, alleging that it was arbitrary because the State did not use the Hay System in making its allocation decision; the State did not gather job-related information before making its decision; the State made the allocation decision by comparing one job to another; and his duties and responsibilities are those of a Compliance Specialist 3. The Board, after reviewing the facts and citing precedents, concluded that the reallocation was not arbitrary or contrary to law or rule and dismissed the appeal. Nehila v. Housing and Community Services, Community Resources Division, Case No. MA-3-02 (July 2002).

11.2.10 2 Reallocation appeal was timely, the Board ruled, where Appellant filed it within 15 days after the agency head's grievance procedure response was due. The Board determined that the agency head's "final decision" (under OAR 115-45-015, as revised December 1, 1995) did *not* occur when the agency head: (a) told Appellant that DAS determined that a lower classification was more appropriate than his then-current classification, or (b) told Appellant that the agency would take no further action regarding the classification to which he was being allocated. The Board found that the agency head had questioned the DAS determination and, during grievance processing, told Appellant that she would also attempt to address his concerns in other ways. Under the circumstances, the Board concluded that the agency head's failure to respond to Appellant's grievance amounted to her "final decision," for the purpose of determining the timeliness of the appeal. Because the appeal was filed within 15 days after the agency head's failure to respond, the Board ruled the appeal timely. (In footnote 6, the Board stated that "it would work a manifest injustice to construe this Board's prior rule in a way that precluded a decision on the merits.") Young v. Educational Policy and Planning Office, Administrative Services Department, Case No. MA-20-95 (July 1998).

11.2.10 3 Allocation of unrepresented executive analyst 4 (salary range 30) to education program specialist (EPS) (salary range 29) was not arbitrary, contrary to law or rule, or taken for political reason, the Board held. Appellant asserted that his salary placement was arbitrary, because union-represented EPSs are compensated at salary range 31. The Board found that DAS had used a rational manner (application of the Hay classification system) in deciding to allocate Appellant's position to the EPS classification. Further, the Board stated that "the fact that represented employees in the EPS class, as a result of collective bargaining, are at salary range 31 does not make Appellant's placement at [salary range] 29 nonrational." (Order at 8.) In footnote 8, the Board determined that the allocation was supported by "substantial evidence," as that test was described in *Rodriguez v. Secretary of State*, Case No. MA-24-94 (1995) ("relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). The Board stated: "Here, DAS' comparison of job duties, use of the Hay method and explanation for placing Appellant at salary range 29 (rather than 31) conforms with this modest evidentiary test." *Decision not contrary to law or rule*. The Board found that a DAS rule requires allocations to be based on a Hay evaluation and that DAS did use that system in arriving at its decision. The Board rejected Appellant's contention that DAS did not use the Hay system and concluded that DAS's placement of Appellant in the EPS classification was not contrary to law or rule. Young v. Educational Policy and Planning Office, Administrative Services Department, Case No. MA-20-95 (July 1998).

11.2.10 4 Natural Resource Specialist (NRS) 3 appealed his placement in that classification, contending that he should be classified as a NRS 4 (Case No. MA-18-96). In settlement of that appeal, the Department agreed to request an individual from outside of the Department to conduct a classification review and Appellant agreed to withdraw his appeal. About a year later, after the new review confirmed the NRS 3 placement, Appellant filed a second appeal challenging the classification (Case No. MA-8-97). Because the appeal was not filed within 15 days after the final decision of the agency head (as required by OAR 115-45-020), the Board dismissed the appeal as untimely. O'Neil v. Fish and Wildlife Department, Case No. MA-8-97 (September 1997).

11.2.10 5 Auditors appealed the reallocation of their positions to job classifications at lower pay grades, claiming that the reallocations were arbitrary, contrary to law or rule, or taken for political reasons. The Board noted that, in reviewing the allocation of a position to a particular class, the Board does not decide whether the reallocation was correct or judge the efficacy of the management

decision but rather determines if there was a rational basis for the particular allocation decision. The Board concluded that the decisions regarding the reallocation of Appellants' positions were rational and supported by substantial evidence, and dismissed the appeals. Rodriguez et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-94 (September 1995).

11.2.12 Position abolished/duties reassigned

11.2.12 1 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

11.2.12 2 Classified employee alleged that PUC had failed to transfer him to DOT, in violation of ORS 240.086(1). (Senate Bill 1149 (1995) mandated the transfer of PUC *positions*, but not necessarily *employees*, to DOT.) The Board reviewed ORS 236.610, which provided that public employees shall not "be deprived of employment solely because the duties of employment have been assumed or acquired by *another* public employer * * *." (Emphasis added.) The Board concluded that the statute "was intended to address the transfer of positions from one *political jurisdiction* to another." (Order at 13.) In doing so, the Board determined that PUC and DOT are agencies of the same employer, the State of Oregon, so the transfer statute was inapplicable. The Board also rejected Appellant's four arguments that the failure to transfer was arbitrary or contrary to law. *(1) Alleged promise of employment*: (a) while DOT made some statements, it did not make any "unequivocal promises to transfer" him from PUC; (b) the statements of members of a transition steering committee, composed of DOT and DAS personnel, were not binding on Respondent (and only DOT had the authority to transfer Appellant); and © while the director of PUC said that employees without performance problems would become employed by DOT, DOT determined that Appellant *had* experienced performance problems. *(2) PUC retention of outdated appraisals*: Appellant also contended that PUC disregarded its practice and retained outdated performance appraisals in his file, which DOT considered in deciding not to transfer him; however, the assigned DOT reviewer established that she had considered only the files that were appropriately included in Appellant's file. *(3) Refusal of transfer to lower-level positions*: Appellant sought employment in lower-level positions that were to be transferred to DOT. Because that transfer was imminent, the Board decided that PUC had not acted irrationally in deferring that employment decision to DOT. *(4) Age discrimination*: Based on *Phillips v. Department of Revenue*, 23 Or App 748 (1975), the Board held that it did not have jurisdiction to decide the claim that the State's failure to transfer Appellant was because of his age (52). Appeal dismissed. Reynolds v. PUC, Case No. MA-23-95 (November 1996).

11.2.13 Application for classified employment

11.2.13 1 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board

ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

11.2.20 Other personnel actions

11.2.20 1 Appellant alleged that the State refused to reimburse him for certain tuition expenses. Based on the ALJ's investigation, the Board stated that: on November 5, 2002, Appellant filed a circuit court small claim action against the State to collect that sum; effective November 15, he resigned from his employment; on December 20, the State filed an answer denying Appellant's small claim; and on April 24, 2003, Appellant filed the subject SPRL appeal. The Board deemed the State's denial of Appellant's request for tuition expense reimbursement to be a "personnel action," under ORS 240.086(1), and noted that Board Rule 115-45-0020(1) provides that an appeal of a personnel action must be filed "no later than 15 days after the effective date of [the personnel] action." Because Appellant filed his appeal more than 15 days after the State's December 20 personnel action—the denial of his tuition reimbursement request—the Board dismissed the appeal as untimely. Somdah v. Public Utility Commission, Case No. MA-14-03 (September 2003).

11.2.20 2 The agency hired Wang and agreed to pay her a pay-line exception; later—despite her outstanding performance ratings—it failed to pay her cost of living increases. She grieved and DAS directed the agency to reimburse her. The agency informed employees of that result and, minutes later, informed Wang about concerns with her work performance and the possibility that the agency could terminate her pay-line exception. The Board stated that it was convinced by the facts, "particularly . . . the timing and nature of [the agency's] actions, that [the agency's] conduct was retaliatory, not rational, and therefore arbitrary." To remedy the ORS 240.086 violation, the Board ordered the agency to cease and desist from retaliating against Wang for her grievance activity and "to reimburse Wang for lost wages and benefits . . . and ton continue to pay Wang at the top step of range 35, including any future general salary increases, unless and until such time as [the agency] properly meets the criteria for terminating [her] pay-line exception." Wang v. Geology and Mineral Industries Department, MA-12-02 (May 2003).

11.2.20 3 Academic degree administrator, a classified employee, received a letter his supervisor sent to the government standards and practices commission in which she criticized a complaint he filed with the commission. Appellant appealed the issuance of the letter as a personnel action against him, within the meaning of ORS 240.086. The Board dismissed the appeal, finding that no personnel action had been taken against Appellant, because he was not adversely affected in any way by the letter. The Board also dismissed the appeal for lack of prosecution. Young v. Office of Educational Policy and Planning, Case No. MA-22-94 (September 1994).

11.3 Appropriateness of personnel action

11.3 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applied to violations of

state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board concluded that the State, which may "interpret and flesh out the policy in a reasonable fashion," had acted consistently with its prior interpretation and application of the layoff policy and reasonably interpreted the policy to allow an employee who is bumping into a position and the supervisor to determine if the employee is capable of performing the position's duties within 30 days. The Board found that the appellant failed to meet his burden of proving that the State's decision that the employee was qualified for the appellant's position was arbitrary. The Board also ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position for which he had originally agreed he was qualified. The Board also stated that even if the appellant had proven he was improperly laid off, he would not be entitled to monetary damages because he failed to mitigate his damages by turning down several suitable State positions. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

11.3 2 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

11.3 3 "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." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

11.3 4 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

11.3 5 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

11.3 6 Revenue agent in the classified service was dismissed for falsifying records and wasting the state's resources in scheduling field trips. Because Appellant admitted the charged misconduct, the Board considered only the appropriateness of the penalty imposed by the agency. After reviewing the nature of Appellant's misconduct, his employment history, and evidence of mitigating circumstances, the Board concluded that dismissal was objectively reasonable. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

11.3 7 Fish and wildlife technician in the classified service received a pay reduction for failing to set an alarm. The Board held that the pay reduction was objectively reasonable given the potential consequences of Appellant's failure and Appellant's employment history. Appellant also was dismissed for an off-duty confrontation with his neighbors. The Board held that dismissal was objectively reasonable, given his disciplinary history and history of problems with his neighbors. Lawson v. Department of Fish and Wildlife, Case Nos. MA-15/28-94 (July 1995).

11.3 8 Office specialist 1, a classified service employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial; (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. The Board applied the "reasonable employer" test and dismissed the appeal: "[t]he errors which form the basis for Wilson's dismissal occurred after a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." The Board found that dismissal was reasonable, despite Appellant's more than 30 years of service to the State, where the State had made "repeated efforts" to assist Appellant in improving her performance and dismissed her only after it was clear she could not correct her deficiencies. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995)

11.3 9 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3) and affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Appellant's proven record of excessive absences

and tardiness constituted "inefficiency," and his lies to his supervisor about his intention to report to work, and his failure to notify his supervisor about his absences were acts of intentional wrongdoing that constituted "misconduct." The Board held that dismissal was "within the range of disciplinary measures that appropriately might be imposed" for Appellant's conduct. (Order at 12.) Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

11.3 10 Office assistant 2 was dismissed for various performance problems, including customer billing errors totaling $9,000, failure to complete an equipment inventory, repeated typographical errors, and misrouting mail. She had been reprimanded and demoted for related performance problems before the dismissal. The Board, applying the reasonable employer test, found that the agency had proved that Appellant was guilty of the billing error and that the billing error alone was sufficient grounds to sustain the dismissal. The Board said that "[a] reasonable employer cannot be expected to retain a clerical employee who repeatedly demonstrates that she cannot accurately maintain important records." (Order at 14.) Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

Chapter 12—Management Service Employment

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

12.1 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

12.1 2 In setting aside employee's removal from management service, the Board reviewed the case law regarding the State's burden of proof and the standard of review under ORS 240.570, stating: (1) the State has the burden of proving that its discipline complied with ORS 240.570(3), citing *Ahlstrom*

v. Department of Corrections, Case No. MA-17-99 at 14 (October 2001), and the State meets this burden if its actions were "objectively reasonable," citing *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981), and *Morisette v. Children's Service Division*, Case No. 1410 at 23 (March 1983); (2) an objectively reasonable employer imposes sanctions proportionate to the offense; considers the employee's length and record of service; clearly defines performance expectations; clearly expresses performance expectations to employees; informs employees when performance standards are not being met; and clearly defines and follows progressive discipline, except for gross offenses; citing *Bellish v. Department of Human Services*, Case No. MA-23-03 at 8 (April 2004), and other cases; (3) a significant factor the Board considers is whether the employee "can no longer be an effective and trusted management service employee," citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984); and (4) management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

12.1 3 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

12.1 4 In the appeal of a management service employee's removal from management service and dismissal from classified service, the Board stated that it first determines whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. If the State proves any of the charges, the Board then

applies the reasonable employer test twice, once to establish whether the State has carried its burden of justifying the removal from management service and a second time to determine if the State has established that its action was taken "in good faith for cause." The Board held that a management service employee may be held to "strict standards of behavior, so long as these standards are not arbitrary or unreasonable," citing *Helfer v. Children's Services Division*, Case No. MA-1-91 (February 1992). An important consideration is the damage done to the relationship of trust between an employer and the employee. *Reynolds v. Department of Transportation,* Case No. 1430 (October 1984). The State need not prove all of the charges on which it relied in removing an employee from management service, citing *Ahlstrom v. State of Oregon, Department of Corrections,* Case No. MA-17-99 (October 2001).The State can dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee, citing *Smith v. Transportation Department,* Case No. MA-4-01 (2001) at 8. The Board held that the employer's burden in justifying a removal from management service is relatively minor, but in a dismissal, the employer must establish that its action was taken 'in good faith for cause, citing ORS 240.570(5), 240.555, 240.560(4), *Plank v. Department of Transportation*, Case No. MA-17-90 (1992) at 29, and *Peyton v. Oregon State Health Division*, Case No. MA-4-87 (January 1989), *order on recon* (February 1989). Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.1 5 In dismissing a management service employee's reprimand appeal, the Board stated that a manager may be reprimanded if she "is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." ORS 240.570(3). In reviewing such discipline, the Board determines whether, under all of the circumstances, the State's action was "objectively reasonable," citing *Bellish v. Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004); and *Morisette v. Children's Services Division*, Case No. 1410 (March 1983). The Board also held that the State need not prove all of the charges on which it relied in disciplining a management service employee, citing *Reidy v. Oregon Government Ethics Commission*, Case No. MA-6-85 (August 1986) and other cases. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

12.1 6 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

12.1 7 The Board has jurisdiction to review a management service employee's appeal of a reprimand, it concluded. The State asserted that, under ORS 240.570(4), management service employees are entitled to appeal only the forms of discipline listed in ORS 240.560: reduction, dismissal, suspension, or demotion. The Board reasoned: "The appeal rights granted to management service employees by ORS 240.570(4) encompass discipline—one form of which is a reprimand—specifically listed in ORS 240.570(3). The explicit reference to ORS 240.560, relied upon by the State, refers to the *manner* of appeal, i.e., the way it is to be done. This language does not limit which actions may be appealed." Member Thomas dissented to this ruling. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

12.1 8 Labor relations manager appealed his removal from the management service. The Board applied the reasonable employer standard to determine whether Appellant's actions gave cause for a reasonable employer to remove him. The Board found that the three charges against Appellant were proven—he filed an Oregon State Bar complaint against a union attorney contrary to directions from his supervisor, he made an ex parte contact with an interest arbitrator contrary to his supervisor's directives, and he misrepresented to a client agency the reasons an unfair labor practice complaint was being bifurcated—and that any of the charges supported removal. The removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

12.1 9 Six audit managers were removed from their management service positions (for non-disciplinary reasons) and placed in classified service positions. Appellants appealed their removal to the Board under ORS 240.570(2), which authorizes the removal of employees from management service "due to reorganization." Citing *Knutzen v. Department of Insurance and Finance*, 129 Or App 565 (1994), *order on remand* (November 1994), the Board concluded that management service removals due to reorganization must meet the "good faith for cause" standard of ORS 240.560. The Board dismissed the appeals, finding that the removal of Appellants from management service was "for cause" because it was due to a bona fide reorganization; there was no allegation that the agency acted in bad faith. Rawls v. Secretary of State, Audits Division, Case No. MA-8-94 (November 1994), upheld on reconsideration (December 1994).

12.1 10 The Board ruled that, because ORS 240.570 was silent as to the standard to be applied in reviewing management service removals, it would apply the "arbitrary or contrary to law or rule, or taken for political reasons" of ORS 240.086(1). The Board set aside the removal of Appellant, finding that the agency had not followed its own policy in selecting employees for layoff. The court of appeals reversed, holding that ORS 240.570(4), which provides that management service employees may appeal assignments, reassignments, transfers and removals to this Board "in the manner provided by ORS 240.560," was the only part of Chapter 240 which made review by the Board applicable to management service employees. The court of appeals concluded that these laws did not give the Board authority to set aside or modify a personnel action for violation of a personnel rule. The case was remanded to the Board to determine whether Appellant was laid off in violation of ORS 240.560. On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4), because there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety

and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

12.1 11 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board applied the reasonable employer test twice, once to the management service removal and once to the classified service dismissal, holding that the cause to support a removal might be less than that necessary to support a dismissal. The Board upheld the removal from management service under ORS 240.570(3), finding that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

12.1 12 Support services supervisor 2 appealed her removal from management service and restoration to a position in the classified service. In upholding the removal, the Board concluded that the state was justified in removing Appellant based on some of the proven charges. The Board determined that the proven charges showed that Appellant had failed to exercise good judgment filling certain positions, failed to follow directives concerning a telephone system change, and failed to cooperate with her supervisors in making the transition to a job rotation. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

12.1 13 Appellant challenged his removal from management service due to reorganization as a demotion. The Board ruled that Appellant, a management service employee, could not appeal the removal as a "demotion" under ORS 240.560(1). The Board also dismissed Appellant's primary appeal (challenging on other grounds his removal from management service) as untimely. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

12.1 14 Correctional captain appealed his removal from management service and restoration to a classified service position. The Board held that, in applying the provisions of ORS 240.570(3), an agency may need less cause to remove a management service employee under the reasonable employer standard. The Board upheld the removal, finding that the charges were substantiated and justified removal. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

12.1 15 Contracts officer, a management service employee, appealed his reclassification. The Board dismissed the appeal, ruling that under ORS 240.570, its jurisdiction over non-disciplinary management service personnel actions was limited to assignment, reassignment, transfer, and removal due to reorganization or lack of work. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

12.1 16 The Board dismissed as untimely the appeal of a principal executive manager A challenging the agency's refusal to consider her request for reclassification to principal executive manager B during a reorganization. In a footnote, the Board noted that even if the appeal was timely it would have been dismissed for lack of jurisdiction, citing *Yandell v. Executive Department*, Case No. MA-2-85 (July 1985) for the proposition that the Board does not have jurisdiction under ORS 240.570(2) to hear reclassification appeals from management service employees. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

12.2 Management service employee conduct expectations

12.2 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

12.2 2 In setting aside employee's removal from management service, the Board reviewed the case law regarding the State's burden of proof and the standard of review under ORS 240.570, stating: (1) the State has the burden of proving that its discipline complied with ORS 240.570(3), citing *Ahlstrom v. Department of Corrections*, Case No. MA-17-99 at 14 (October 2001), and the State meets this burden if its actions were "objectively reasonable," citing *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981), and *Morisette v. Children's Service Division*, Case No. 1410 at 23 (March 1983); (2) an objectively reasonable employer imposes sanctions proportionate to the offense; considers the employee's length and record of service; clearly defines performance expectations; clearly expresses performance expectations to employees; informs employees when performance standards are not being met; and clearly defines and follows progressive discipline, except for gross offenses; citing *Bellish v. Department of Human Services*, Case No. MA-23-03 at 8 (April 2004), and other cases; (3) a significant factor the Board considers is whether the employee "can no longer be an effective and trusted management service employee," citing *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984); and (4) management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

12.2 3 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her

conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.2 4 In dismissing a management service employee's reprimand appeal, the Board stated that a management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable, citing *Stoudamire v. Department of Human Services*, Case No. MA-4-03 (November 2003); and *Helfer v. Children's Services Division*, Case No. MA-1-91 (February 1992). In reviewing discipline, the Board also may consider any damage to trust in the relationship between a management service employee and the employer, citing *Reynolds v. Department of Transportation*, Case No. 1430 (October 1984). Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

12.2 5 A "reasonable employer," the Board stated in a management service removal decision, is one "whose actions are rational and fundamentally fair. Such an employer defines performance expectations, clearly expresses those expectations to employees, and informs them when performance standards are not being met. Most importantly, when confronted with deficiencies that it considers serious enough to warrant discipline, the reasonable employer unambiguously communicates that fact to the subject employee. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989) [management service]. *Van Brown* [*v. Oregon College of Education*, Case Nos. 1046/1067 (October 1980), 52 Or App 251, 628 P2d 410 (1981) classified

service]." (Order at 8.) Ash v. Transportation Department, Case No. MA-21-98 (June 2000), AWOP, 184 Or App 226, 56 P3d 968 (2002).

12.2 6 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly. These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

12.2 7 Labor relations manager appealed his removal from management service. The Board found that the three charges against Appellant were proven—he filed an Oregon State Bar complaint against a union attorney contrary to directions from his supervisor, he made an ex parte contact with an interest arbitrator contrary to his supervisor's directives, and he misrepresented to a client agency the reasons an unfair labor practice complaint was being bifurcated—and that any of the charges supported removal. The Board concluded that Appellant acted with knowing disregard for his supervisor's directives and the agency's interests. The removal was affirmed. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

12.2 8 Mental health supervising RN received a written reprimand from her supervisor at the Oregon State Hospital because she had failed to disclose information to her supervisor during an investigation conducted by the agency. The Board found that Appellant's failure to disclose what she knew was contrary to her obligations as a management service employee. The Board dismissed Appellant's appeal of the letter of reprimand, concluding that the employer's action was objectively reasonable. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

12.2 9 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), stating that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board also affirmed the dismissal from classified service

under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

12.2 10 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board concluded that Appellant's conduct provided reasonable cause for the removal and dismissal but set aside the removal and dismissal because the agency based the discipline on one incident which it had ignored for a year and a second incident it had told Appellant was resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

12.2 11 Support services supervisor 2 was removed from management service and restored to a position in the classified service. The Board found that the removal was justified, concluding that the some of the proven charges showed that the employee had failed to exercise good judgment in the performance of her management service duties. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

12.2 12 Correctional captain was removed from his management service position and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, concluding that the charges were substantiated and justified removal. The Board noted that "[a] reasonable employer could be expected to remove a manager who engaged in actions toward a subordinate that created an atmosphere of intimidation." (Order at 17.) Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

12.2 13 In dismissing an appeal, the Board stated that "[g]ood judgment is what a manager is hired to exercise, regardless of what specific written directives might state. *See Helfer* [Case No. MA-1-91 (1992), at 23-24." Further, the employer "can justifiably expect its managers to be responsive to the spirt and not just the letter of its directives. Hopkins could have, but did not, seek clarification about his supervisors' directive. A management service employee can justifiably be expected to exhibit some initiative and operate without explicit directions and instructions. *Patrick v. Department of Agriculture*, Case No. MA-2-91, at 13 (June 1991)." (See entry in section 13.36.) Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

12.3.1 Dismissal (see also 12.3.8)

12.3.1 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The

Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

12.3.1 2 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

12.3.1 3 After the Board ordered the reinstatement of a management service employee to the classified position which she had previously held, the State filed a motion for reconsideration regarding the back pay award. The State argued that the back pay award should be reduced because the appellant had received unemployment benefits and had been removed from the workforce due to attendance at school. The Board denied the motion because there was no evidence in the record regarding either matter. The Board stated that such issues would be more properly pursued during compliance proceedings before the Board, at which point the parties could introduce these facts as evidence and argue the effects of these facts on the back pay amount. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.1 4 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found

that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.1 5 Where the State removed appellant from management service and dismissed her from state service under ORS 240.570(5), which applies to management service employees with immediate prior classified service, but no evidence was presented at the hearing regarding her immediate prior classified status, the Board assumed that the appellant had such prior status. In addition, where the State's dismissal letter failed to expressly remove the appellant from management service, the Board held that such removal was inherent in the appellant's dismissal from classified service and it would not require that the grounds for the removal from management service and dismissal from classified service be separately stated. However, the Board must address both issues. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.1 6 In the appeal of a management service employee's removal and dismissal from classified service, the Board stated that a classified employee is entitled to the following procedural safeguards prior to being dismissed: notification of the charges against the employee, notification of the kind of sanctions being considered, and an informal opportunity to refute the charges, either orally or in writing, before the decision is made citing *Tupper v. Fairview Hospital*, 276 Or 657, 665, 556 P2d 1340 (1976). The State is not required to take the additional step of interviewing the employee during its investigation to satisfy due process. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.1 7 The Board dismissed a management service employee's appeal of termination for want of prosecution after appellant failed to respond to the ALJ's warning that the appeal would be dismissed

if appellant did not contact her to set a hearing date. The Board cited *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Crawford v. Department of Corrections, Case No. MA-4-04 (October 2004).

12.3.1 8 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

12.3.1 9 *Management service removal appeal*. (See companion entries in sections 5.2.2, 11.2.1, and 16.2.) On further review, the Board held that it did not have jurisdiction to consider either "Appellant's dismissal from classified service or her plea for reinstatement" to her management service position. (Order at 4.) After noting that Appellant's classified termination appeal was untimely and therefore dismissed, the Board stated that "dismissal of that appeal necessitates dismissal of her management service removal appeal as well." (Order at 3.) The Board observed that management service and classified service are both categories of state service and that management employees have fewer SPRL rights than classified employees. The Board then stated: "As it is a category of state service, it is axiomatic that continued employment in management service requires continued employment as a state employee. Said differently, there is no management service status independent of state employment. A management service employee with prior classified service does not have separate status as a management service employee and a state employee. The employee's management service status is merely a part of the employee's overall identity as a state employee. Once state employment has been terminated, there is no independent right to continue in management service. Neither is there an independent right to be restored to management service, absent the right to be restored to classified service." (October 1998 Order at 4.) The Board stated that Appellant's right to appeal her management service removal was "interdependent" on her right to appeal her classified service dismissal. Finally, the Board stated that, even if Appellant still had a right to appeal her management service removal, "there would be no effective remedy that this Board could order." The Board reasoned: "In order to be restored to management service, Appellant must be in the classified service, a state employee. When her state employment was terminated (and her [classified service] appeal right was lost [due to being untimely]), her restoration right was lost as well. This essentially renders the appeal moot." (Order at 5.) Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

12.3.1 10 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client's questions about the matter. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

12.3.1 11 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), concluding that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

12.3.1 12 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board found that reasonable cause existed for the removal and dismissal but set the discipline aside because the agency based it on one incident which had been ignored for a year and a second which the agency had told Appellant was resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

12.3.2 Constructive discharge/discipline

12.3.2 1 Park manager appealed his transfer from Lake Owyhee State Park (one of few places where the Department provides employees with housing) to the unit's headquarters at Farewell Bend State Park, asserting that it was a form of discipline. The Board found that the Department had rational reasons for transferring Appellant: he enforced rules at Owyhee in a manner that offended or upset some users, and interacting with other Department employees at the headquarters was likely to assist him improve his interpersonal skills. The Board concluded that Appellant did not prove that the Department transferred him for reasons other than the good of the service and dismissed the transfer appeal. Separately, the Board concluded that Appellant failed to establish that the Department intended for the transfer to be a form of discipline. The Board noted that an individual's belief that an action is disciplinary does not make it so: "In cases involving allegations of constructive discipline, this Board and Oregon courts have required the employee to produce evidence to establish that the employer had a disciplinary motivation." Concluding that Appellant had not met that burden, the Board also dismissed this element of the appeal. Rau v. Parks and Recreation Department, Case No. MA-2-01 (January 2002).

12.3.2 2 Management service employee's resignation from State employment, in lieu of accepting return to classified service, precluded the Board from asserting jurisdiction over the employee's later appeal of his removal, the Board ruled. The Board found that, on December 3, 1999, the State

removed Appellant from management service and returned him to classified service, effective January 1, 2000; on December 27, 1999, he submitted a resignation effective December 31, 1999; and on January 10, 2000, he filed an appeal, in which he asserted that he did not resign his position in the management service but was effectively terminated. The Board stated that, when Appellant resigned from his management service position, he resigned from State employment, had no right to State employment, and did not have the right to assert that his removal and restoration violated ORS 240.570(1) or (3). (In its decision, the Board cited and quoted *Smith v. Transportation Department*, Case No. MA-2-98 (April 1998), in which the Board dismissed a classified employee's termination appeal and remanded a management service removal appeal but later (October 1998) dismissed the management service removal appeal, Member Whalen dissenting; AWOP 166 Or App 238, 999 P2d 563 (2000).) Humphreys v. Forestry Department, Case No. MA-1-00 (May 2000).

12.3.2 3 Correctional captain appealed his removal from management service and restoration to classified service. Appellant resigned rather than take the classified position, claiming that the agency constructively discharged him because of the timing of the action, the location of the classified service position, and the financial hardship which would result. The Board rejected Appellant's contention that he had been constructively discharged, applying the test for constructive discharge set forth in *Holley v. Department of Environmental Quality,* Case Nos. MA-9/13-89 (April 1989): (1) the employer must deliberately create the difficult working conditions, (2) with the intention of forcing the employee to quit, and (3) the employee did quit because of the difficult working conditions. The Board upheld the removal/restoration. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

12.3.3 Trial service removal

12.3.3 1 A management service employee appealed removal from management service and reinstatement to classified service during her trial service period . The Board rejected the appellant's argument that state policies overruled prior Board case law and provided appeal rights for management service employees. Citing to *Taylor v. State of Oregon, Department of Corrections*, Case No. MA-4-00 (May 2000), the Board held that it has no authority to review appeals of management service removals during trial service periods under ORS 240.570(3). Jackson-Graves v. Department of Justice, Division of Child Support, Case No. MA-11-05 (January 2006).

12.3.3 2 While on trial service, the State removed Appellant from management service, and he appealed. The Board dismissed the appeal, citing *Executive Department Declaratory Ruling*, Case No. DR-8-85, 8 PECBR 8271 (1985), in which the Board stated that it "has no authority to review appeals from Management Service employees who are removed from a trial service period which has been established pursuant to rules of the Division under ORS 240.250." (Order at 3.) Taylor v. Corrections Department, Case No. MA-4-00 (May 2000).

12.3.4 Demotion within management service

12.3.4 1 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board

also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

12.3.4 2 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

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

12.3.5 1 A management service employee requested that the appeal of his removal from management service be held in abeyance pending the outcome of related criminal proceedings. The Board dismissed the appeal for lack of prosecution after the appellant failed to respond to the ALJ's query about the status of the criminal case and the ALJ's subsequent warning that the appeal would be dismissed unless the appellant notified the ALJ that he was ready to proceed with his appeal. Monem v. Department of Corrections, Case No. MA-05-07 (November 2007).

12.3.5 2 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

12.3.5 3 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

12.3.5 4 The Board dismissed a management service employee's appeal of his removal for lack of prosecution after appellant verbally notified the ALJ that he was withdrawing his appeal, but failed

to respond to the ALJ's request for a written withdrawal. Jones v. Oregon Youth Authority, Case No. MA-1-05 (May 2005).

12.3.5 5 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

12.3.5 6 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

12.3.5 7 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those

who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

12.3.5 8 Nurse manager had a medical condition she said made it difficult for her to be at the work site and she claimed that she could perform the essential functions of her position at home. The Board upheld the agency's refusal to allow Appellant to work at home, concluding that a nurse manager could not effectively hire, evaluate, make assignments or discipline from home. The Board affirmed Appellant's removal from the management service, concluding that Appellant was removed because she was unable to perform the duties of her position satisfactorily. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

12.3.5 9 Labor relations manager was removed from management service and dismissed from state service for being unable or unwilling to perform the duties of his position satisfactorily. The agency charged Appellant with: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

12.3.5 10 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), finding that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board determined that Appellant knew or should have known that prompt and regular attendance was important in his position and that his failure to live up to the standards expected by the agency demonstrated that he was unable or unwilling to perform the duties of his position satisfactorily. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

12.3.5 11 Support services supervisor 2 was removed from management service and restored to a position in the classified service for several reasons, including failure to timely fill vacant positions, failure to follow directives concerning a change in the telephone system, failure to complete performance evaluations in a timely manner, and failure to cross-train employees in preparation for a new program. The Board affirmed the removal, concluding that certain of the proven charges established that Appellant was unable or unwilling to perform the duties of her position satisfactorily. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

12.3.5 12 Correctional captain was removed from his management service position and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board ruled that under the "unable or unwilling" language of ORS 240.570(3), an agency may need less cause to remove a management service employee than would be required to discipline a classified service employee. The Board upheld the removal, finding that the charges were substantiated and justified removal. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

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

12.3.6 1 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

12.3.6 2 Section manager of information systems (principal executive manager D-I) appealed his removal from management service and restoration to classified service as part of a reorganization. The Board rejected Appellant's argument that the reorganization was an artifice and that the real reason for his removal was a manager's dissatisfaction with Appellant's performance and Appellant's objections to some of the manager's decisions. The Board determined that "the reorganization meets the deferential standards" discussed in Board precedents. Concluding that Appellant was properly laid off in the course of a reorganization made under ORS 240.570(2), the Board dismissed the

appeal. Hauck v. Housing and Community Services Department, Case No. MA-1-03 (December 2003).

12.3.6 3 Chief records officers were removed from management service, in good faith for cause, as part of a legitimate reorganization, the Board held. The Board stated: "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." (Order at 11.) The Board determined that the reorganization was legitimate: the State centralized its operation, reassigned tasks, redefined supervisory and managerial responsibilities, and conducted a competitive recruitment for newly-created positions to which Appellants were not appointed. Rosevear and Tetzlaff v. Corrections Department, Case Nos. MA-4/6-97 (February 1998).

12.3.6 4 Six audit managers were removed from their management service positions for non-disciplinary reasons as part of a reorganization. They appealed their removal from management service to the Board under ORS 240.570(2). Citing *Knutzen v. Dept. Of Ins. And Finance*, 129 Or App 565 (1994); *order on recon.* (Nov. 14, 1994), the Board concluded that management service removals due to reorganization must meet the "good faith for cause" standard of ORS 240.560. The Board dismissed the appeals, finding that the removal of Appellants from management service was "for cause" because it was due to a bona fide reorganization and involved an actual change in Appellant's job duties and responsibilities. Rawls v. Secretary of State, Audits Division, Case No. MA-8-94 (November 1994), upheld on reconsideration (December 1994).

12.3.6 5 Appellant was removed from his management service position as part of a reorganization. Finding that ORS 240.570 was silent concerning the standard of review for nondisciplinary removals, the Board applied ORS 240.086(1) and set aside Appellant's removal as being "arbitrary or contrary to law or rule, or taken for political reasons" because the agency had not followed its own policy in removing Appellant from management service. The court of appeals reversed, holding that ORS 240.086(1) did not apply to management service employees and remanded the case to the Board to determine whether Appellant was laid off in violation of ORS 240.560. On remand, the Board dismissed the appeal, concluding that Appellant had been dismissed "in good faith for cause" under ORS 240.560(4) because the removal was part of a legitimate reorganization and there was no evidence that the agency's failure to follow its own rules was motivated by anything other than a sincere belief that the rules did not apply. Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

12.3.6 6 Service systems and programming supervisor was removed from the management service due to reorganization. The Board dismissed his primary appeal because it was untimely under Board rules and dismissed his alternative appeal that the removal was an appealable demotion under ORS 240.560(1), ruling that Appellant was not a "regular employee" who could appeal under ORS 240.560(1). Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

12.3.7 Removal from management service with restoration to classified service

12.3.7 1 A management service employee appealed removal from management service and restoration to classified service for playing a practical joke on a co-worker and being deceitful in gaining approval from his superiors to play the joke. The Board concluded that the appellant's actions and behavior in planning and executing the practical joke caused a situation perceived by the victim as embarrassing, hostile, and intimidating in violation of the harassment-free workplace policy, but that the appellant had not been deceitful because he did not hide the reason behind the joke or how he intended to carry out the joke. Dismissing appellant's argument that the policy was vague, Board stated that management employees may be held to strict standards of behavior, and it is not unreasonable to expect them to understand the policies they are required to enforce. The Board concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. The Board also found that the State did not give appellant an opportunity to respond to the allegations. The Board determined that some discipline was appropriate and ordered the appellant reinstated to his former position and made whole, minus a one-week suspension without pay, which was the same level of discipline imposed on the other managers. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

12.3.7 2 A management service employee appealed removal from management service and reinstatement to classified service during her trial service period . The Board rejected the appellant's argument that state policies overruled prior Board case law and provided appeal rights for management service employees. Citing to *Taylor v. State of Oregon, Department of Corrections*, Case No. MA-4-00 (May 2000), the Board held that it has no authority to review appeals of management service removals during trial service periods under ORS 240.570(3). Jackson-Graves v. Department of Justice, Division of Child Support, Case No. MA-11-05 (January 2006).

12.3.7 3 "Once an employee is [removed from management service] and restored to the proper classification, subsequent employment issues such as wage level are determined by the collective bargaining agreement for represented employees, and by other legal provisions for unrepresented employees." Hauck v. Housing and Community Services Department, Case No. MA-1-03 (December 2003).

12.3.7 4 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the

Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

12.3.7 5 Heavy equipment mechanic manager was removed from management service and restored to classified service for using a pellet gun to shoot and kill a pigeon in the outdoor bay of a workshop, and possessing a handgun in his private vehicle, when parked in a State lot. The Board concluded that, under the circumstances, an objectively reasonable employer would not have removed Appellant, based upon several considerations. *(1) Appellant's interpretation of the applicable State policy was credible*. Appellant interpreted the State policy prohibiting firearms on State property to mean that a firearm could not be in a State building, and he kept the firearm in his private vehicle, which was not used for State business; the Board found Appellant's reasoning to be "credible," because the policy is subject to that interpretation and Appellant's supervisor initially agreed with that interpretation. When the employer informed him of its contrary interpretation, he immediately conveyed that information to the employees who reported to him. As to this element of the charges, the Board stated that the employer "was not acting as a reasonable employer because it did not clearly express its expectations regarding this policy until *after* Appellant had violated the policy." (Order at 9.) *(2) The employer superseded lesser announced discipline for the infraction with more severe discipline*. Appellant admitted taking employees to his vehicle and showing the firearm to them. In response, his supervisor initially counseled him and said a discipline letter would be placed in Appellant's file. Later, however, the employer removed him from management service. Those actions, the Board concluded, were not the actions of a reasonable employer. (The Board cited a PECBA decision, *ATU v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780 (1998), where the employer suspended and then terminated an employee). *(3) Appellant was a long-term employee with a good record.* The Board noted that Appellant was a 14-year employee who had never before been disciplined. After reviewing those considerations, the Board determined that the removal from management service violated ORS 240.570(3) but—because Appellant had not exhibited appropriate judgment in displaying the firearm to subordinates—determined that some discipline was appropriate. The Board set aside the removal and directed the employer to reinstate Appellant and make him whole "for three quarters of his lost wages and benefits, less other earnings and benefits * * *." (Order at 9.) Ash v. Transportation Department, Case No. MA-21-98 (June 2000), AWOP, 184 Or App 226, 56 P3d 968 (2002).

12.3.7 6 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to

conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly. These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

12.3.7 7 Management service employee's resignation from State employment, in lieu of accepting return to classified service, precluded the Board from asserting jurisdiction over the employee's later appeal of his removal, the Board ruled. The Board found that, on December 3, 1999, the State removed Appellant from management service and returned him to classified service, effective January 1, 2000; on December 27, 1999, he submitted a resignation effective December 31, 1999; and on January 10, 2000, he filed an appeal, in which he asserted that he did not resign his position in the management service but was effectively terminated. The Board stated that, when Appellant resigned from his management service position, he resigned from State employment, had no right to State employment, and did not have the right to assert that his removal and restoration violated ORS 240.570(1) or (3). (In its decision, the Board cited and quoted *Smith v. Transportation Department*, Case No. MA-2-98 (April 1998), in which the Board dismissed a classified employee's termination appeal and remanded a management service removal appeal but later (October 1998) dismissed the management service removal appeal, Member Whalen dissenting; AWOP 166 Or App 238, 999 P2d 563 (2000).) Humphreys v. Forestry Department, Case No. MA-1-00 (May 2000).

12.3.7 8 The Board upheld an arbitrator's award which held that the agency had violated the collective bargaining agreement by failing to post the bargaining unit position of financial examiner 3 before placing a management service employee, whose position had been abolished, in the job. The Board found that the arbitrator's award did not violate ORS 240.570(1), as amended, which specifies that a management service employee "may be returned" to a position held in the same agency prior to the management service appointment. The Board concluded that these reappointment rights are subject to the provisions of any applicable collective bargaining agreement and that the agency had limited its rights to return management service employees to bargaining unit positions. Real Estate Agency v. Oregon AFSCME, Local 3581, Case No. AR-2-93 (April 1994).

12.3.7 9 Support services supervisor 2 was removed from management service and restored to a position in the classified service for several reasons, including failure to timely fill vacant positions, failure to follow directives concerning a change in the telephone system, failure to complete performance evaluations in a timely manner, and failure to cross-train employees in preparation for a new program. The Board affirmed the removal, concluding that certain of the proven charges established that Appellant was unable or unwilling to perform the duties of her position satisfactorily. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

12.3.7 10 Correctional captain was removed from his management service position and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. Appellant resigned rather than take the classified

position, contending that the terms of the restoration amounted to a constructive discharge. The Board upheld the removal and restoration, concluding that the charges were substantiated and justified removal. The Board rejected Appellant's contention that he had been constructively discharged. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

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

12.3.8 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

12.3.8 2 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her

inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. On reconsideration, the State argued that the back pay award should be reduced because the appellant had received unemployment benefits and had been removed from the workforce due to attendance at school. The Board denied the motion because there was no evidence in the record regarding either matter. The Board stated that such issues would be more properly pursued during compliance proceedings before the Board, at which point the parties could introduce these facts as evidence and argue the effects of these facts on the back pay amount. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.8 3 Where the State removed appellant from management service and dismissed her from state service under ORS 240.570(5), which applies to management service employees with immediate prior classified service, but no evidence was presented at the hearing regarding her immediate prior classified status, the Board assumed that the appellant had such prior status. In addition, while the State's dismissal letter of a management service employee failed to expressly remove the appellant from management service, the Board held that such removal was inherent in the appellant's dismissal from classified service and it would not require that the grounds for the removal from management service and dismissal from classified service be separately stated. However, the Board must address both issues Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.8 4 In the appeal of a management service employee's removal and dismissal from classified service, the Board stated that a classified employee is entitled to the following procedural safeguards prior to being dismissed: notification of the charges against the employee, notification of the kind of sanctions being considered, and an informal opportunity to refute the charges, either orally or in writing, before the decision is made citing *Tupper v. Fairview Hospital*, 276 Or 657, 665, 556 P2d 1340 (1976). The State is not required to take the additional step of interviewing the employee during its investigation to satisfy due process. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

12.3.8 5 The Board dismissed a management service employee's appeal of termination for want of prosecution after appellant failed to respond to the ALJ's warning that the appeal would be dismissed if appellant did not contact her to set a hearing date. The Board cited *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Crawford v. Department of Corrections, Case No. MA-4-04 (October 2004).

12.3.8 6 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

12.3.8 7 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

12.3.8 8 *Management service removal appeal*. (See companion entries in sections 5.2.2, 11.2.1, and 16.2.) On further review, the Board held that it did not have jurisdiction to consider either "Appellant's dismissal from classified service or her plea for reinstatement" to her management service position. (Order at 4.) After noting that Appellant's classified termination appeal was untimely and therefore dismissed, the Board stated that "dismissal of that appeal necessitates dismissal of her management service removal appeal as well." (Order at 3.) The Board observed that management service and classified service are both categories of state service and that management

employees have fewer SPRL rights than classified employees. The Board then stated: "As it is a category of state service, it is axiomatic that continued employment in management service requires continued employment as a state employee. Said differently, there is no management service status independent of state employment. A management service employee with prior classified service does not have separate status as a management service employee and a state employee. The employee's management service status is merely a part of the employee's overall identity as a state employee. Once state employment has been terminated, there is no independent right to continue in management service. Neither is there an independent right to be restored to management service, absent the right to be restored to classified service." (October 1998 Order at 4.) The Board stated that Appellant's right to appeal her management service removal was "interdependent" on her right to appeal her classified service dismissal. Finally, the Board stated that, even if Appellant still had a right to appeal her management service removal, "there would be no effective remedy that this Board could order." The Board reasoned: "In order to be restored to management service, Appellant must be in the classified service, a state employee. When her state employment was terminated (and her [classified service] appeal right was lost [due to being untimely]), her restoration right was lost as well. This essentially renders the appeal moot." (Order at 5.) Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

12.3.10 Reduction in pay

12.3.10 1 Campus service supervisor was given a reduction in pay for failing to effectively search for a client who left the campus and for having a visitor during work hours in violation of a directive from his superiors. The Board dismissed the appeal of the disciplinary pay reduction, concluding that the discipline was objectively reasonable given the Appellant's position and a prior reprimand for poor judgment. The Board also held that the State had conducted a fair investigation into the incidents upon which discipline was based and that the discipline was not taken in reprisal for an earlier grievance. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

12.3.11 Reprimand

12.3.11 1 The Board dismissed a management service employee's appeal of a reprimand for untimeliness and lack of prosecution citing *McMinnville Firefighters Association v. City of McMinnville*, Case No UP-4-94, 15 PECBR 83 (1994). The Board found that the information received with the appeal showed that the appeal had been received by the Board 31 days after the reprimand was issued and the appellant had failed to respond to the ALJ's notice that the appeal would be dismissed unless she provided information which showed that her appeal was timely filed. Moriarty v. Department of Human Services, Case No. MA-4-06 (October 2006).

12.3.11 2 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work

and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

12.3.11 3 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals. The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting.

12.3.11 4 Senior Internal Auditor 2, in the management service, was reprimanded and appealed, alleging violation of ORS 240.570(3). The Board denied the State's motion to dismiss the management service reprimand appeal on jurisdictional grounds, citing *Carter v. Corrections Department*, Case No. MA-12-99 (September 2001). After analyzing the record, the Board concluded that the State had proved two of the four charges that Appellant's conduct reflected that he was unable or unwilling to meet the standards that apply to a senior auditor. The Board stated that "a reprimand is one of the mildest forms of discipline. 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." The Board concluded that, under the circumstances, "the Department's reprimand of [Appellant] was not an excessive form of discipline and was objectively reasonable." Appeal dismissed. Hill v. Transportation Department, Case No. MA-7-02 (November 2002).

12.3.11 5 Management service employee was reprimanded for failing to obey an order to meet with a subordinate. Appellant argued that the order essentially required him to give preferential treatment to the subordinate, in violation of State and federal law. The Board concluded that the order did not require Appellant to violate any laws but instead was given to require him to explain to the subordinate comments made in denying the subordinate's training request. Appeal dismissed. Riley v. Veterans Affairs Department, Case No. MA-11-00 (September 2001).

12.3.11 6 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the

investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

12.3.11 7 The Board dismissed for lack of jurisdiction the appeal of a letter of expectations filed by a personnel officer in the management service, stating that such action is not reviewable under ORS 240.570(3) and Board Rule 115-45-023 and that the reasoning in *Morris v. Department of General Services*, Case No. MA-8-91 (September 1991) (no jurisdiction over management service employee's performance appraisal appeal) was applicable. Because it had no jurisdiction over issuance of the letter, the Board stated that it had no jurisdiction to reach Appellant's request to order the employer to remove a reference to a withdrawn letter of reprimand that was contained in the letter of expectations. Burleigh v. Department of Transportation, Case No. MA-16-96 (June 1996).

12.3.11 8 Mental health supervising RN received a pay reduction for failing to disclose information sought by her supervisor during an investigation conducted by the agency. At the hearing, the agency rescinded the pay reduction and issued a letter of reprimand based on the same conduct. The Board found that the agency's action was objectively reasonable because Appellant acted contrary to her obligations as a management service employee by knowingly withholding information. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

12.3.12 Transfer

12.3.12 1 A management service employee appealed the State's denial of a hardship transfer request. Citing *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998) and *Herron v. Department of Corrections,* Case No. MA-20-03 (November 2003), the Board dismissed the appeal for lack of jurisdiction since the denial of a transfer is not among the categories of personnel actions listed under ORS 240.570(4) that management service employees may appeal to the Board. Turner v. Department of Corrections, Case No. MA-12-05 (July 2006).

12.3.12 2 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between

McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

12.3.12 3 Park manager appealed his transfer from Lake Owyhee State Park (where the Department provided him with housing) to a unit headquarters at Farewell Bend State Park, asserting that it was a form of discipline. To determine whether the transfer was "for the good of the service," as required by ORS 240.570(2), the Board examined whether it was "arbitrary"—not supported by some rational reason. The Board observed: "The legislature has chosen to limit the rights of management service employees to appeal transfer decisions. In this appeal, we do not examine or decide whether the Department proved that the user complaints on which the transfer was based were well-founded. Instead, we decide simply whether the Department had a rational reason for transferring [Appellant], under circumstances that included a number of user complaints. In essence, in the context of a management service transfer, management can rationally consider the volume of user complaints to be more significant than appellant's version of what happened in each instance." The Board found that the Department had rational reasons for transferring Appellant: he enforced rules at Owyhee in a manner that offended or upset some users, and interacting with other Department employees at the headquarters was likely to assist him improve his interpersonal skills. The Board concluded that Appellant did not prove that the Department transferred him for reasons other than the good of the service. Appeal dismissed. Rau v. Parks and Recreation Department, Case No. MA-2-01 (January 2002).

12.3.12 4 Management service employee appealed a transfer that was effective December 10. On December 7, he grieved that action with the Department, which (incorrectly, the Board stated) responded that the transfer was subject neither to being grieved nor being appealed. The Board noted that Board Rule 115-40-023(2) provides that a management service employee may appeal a transfer

not later than 10 days after its effective date. Appellant filed his appeal on December 31, more than 10 days after the effective date of his transfer, because he thought that the period to appeal to the Board would begin at the conclusion of the agency grievance procedure. Citing *Smith*, Case No. MA-2-98 (April 1998), AWOP 166 Or App 238, 999 P2d 563 (2000), which involved a similar situation, the Board dismissed the appeal as untimely. Cook v. Justice Department, Child Support Division, Case No. MA-20-01 (January 2002).

12.3.13 Assignment and reassignment

12.3.13 1 A management service employee, who worked for the Oregon University System (OUS), appealed his reassignment. The Board dismissed the appeal for lack of jurisdiction citing to ORS 351.086(1), in which the legislature had removed OUS employees from coverage under the SPRL. The Board also ruled that the appellant's citation to Article I, Sections 10, 20, and 33 of the Oregon Constitution, without explanation of their relevance, provided no basis to bar dismissal of the appeal. Slinker v. Oregon University System, Oregon Institute of Technology, Case No MA-15-07 (December 2007).

12.3.13 2 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his

behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

12.3.13 3 Management service systems and programming analyst was reclassified to a classified service systems analyst II at the same salary range. He appealed in the alternative, alleging that the reclassification was arbitrary, or a demotion. The Board dismissed the appeal as untimely, and dismissed the alternative appeal as inappropriate because the action being appealed was not a demotion. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

12.3.13 4 In dismissing the reclassification appeal of a principal executive manager A as untimely, the Board noted that the appeal would have been dismissed for lack of jurisdiction. Citing *Yandell v. Executive Department*, Case No. MA-2-85 (July 1985), the Board concluded that it did not have jurisdiction under ORS 240.570(2) to hear management service reclassification appeals. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

12.3.14 Classification/allocation of position

12.3.14 1 A management services employee filed an appeal alleging that the State had unlawfully reclassified him from an executive manager B to an executive manager C. The Board dismissed the appeal for lack of jurisdiction since reclassifications and reallocations are not among the categories of personnel actions listed under ORS 240.570(4) that management service employees may appeal to the Board citing *Herron v. Department of Corrections*, Case No. MA-10-03 (November 2003) and other cases. Rieke v. Department of Human Services, Office of Human Resources, Case No. MA-2-06 (August 2006).

12.3.14 2 A management service employee filed an appeal alleging that the State had wrongfully failed to reclassify his position. The Board dismissed the appeal for lack of jurisdiction citing to *Herron v. Department of Corrections*, Case No. MA-20-03 (November 2003) in which it held that reclassification and reallocation are not among the categories of personnel actions which management service employees are entitled to appeal under ORS 240.570(4). Nelson v. Employment Department, Office of Human Resources, Case No. MA-8-05 (September 2005).

12.3.14 3 A management service correctional lieutenant appealed his reclassification to a classified service sergeant position, represented by a labor organization. The Board granted the State's motion to dismiss for lack of jurisdiction, stating that reclassification and reallocation actions "are not among the specific categories of personnel actions which ORS 240.570(4) provides that a management service employee may appeal to this Board." Herron v. Corrections Department, Case No. MA-20-03 (November 2003).

12.3.14 4 Safety Specialist 1, in the management service, appealed the State's alleged addition of a significant number of duties from the Safety Specialist 2 classification to his position's responsibilities. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction to decide classification issues involving management service employees, as previously determined in *Jester v. Corrections Department*, Case No. MA-9-00 (October 2000). The Board reviewed ORS 240.570(2) and (3), which limit management service employees' appeal rights,

reaffirmed *Jester*, and dismissed the appeal. Liepins v. Oregon State Hospital, Case No. MA-14-02 (December 2002).

12.3.14 5 Principal executive/manager C, in the management service, appealed her classification to PE/M B. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction to decide classification issues involving management service employees, as previously determined in *Jester v. Corrections Department*, Case No. MA-9-00 (October 2000). The Board reviewed ORS 240.570(2) and (3), which limit management service employees' appeal rights, reaffirmed *Jester*, and dismissed the appeal. Mendenhall v. Oregon State Hospital, Case No. MA-27-02 (December 2002).

12.3.14 6 Principal executive/manager G (in the unclassified service, according to the State) appealed his reassignment or reallocation to PE/M F. The State moved to dismiss the appeal, arguing that the Board did not have jurisdiction over unclassified service employees or over those issues, even if Appellant were in the management service. The Board cited statutes and rules that apply to management service appeals and dismissed Appellant's unclassified service reassignment appeal as untimely and his reclassification appeal as outside of the Board's jurisdiction. Aguirre v. Human Services Department, Case No. MA-25-02 (December 2002).

12.3.14 7 Jail inspector was reallocated from management service to a classified service position as program technician 2, and he appealed. The Board dismissed the appeal, ruling that it did not have jurisdiction over that type of management service employee personnel action. The Board noted that ORS 240.240 provides that management service personnel are not subject to the SPRL, with limited exceptions, and that they have the right, under ORS 240.570(2) and (3), to appeal only six types of personnel actions: assignment; reassignment; transfer for the good of the service; removal from management service due to reorganization or lack of work; discipline; and removal from management service if unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. The Board observed that "[a] reclassification or reallocation decision regarding a management service employee does not involve a determination of employee 'fault' or any question of the validity of a reorganization or claim of a lack of work. Instead, it may be a technical decision involving a comparison of work performed and the duties and responsibilities of a particular classification." (Order at 3.) The Board concluded that Respondent did not discipline or remove Appellant from management service (due either to reorganization or performance issues), and stated that the appeal did not allege that Respondent's action amounted to an appealable assignment, reassignment, or transfer. Appeal dismissed. Jester v. Corrections Department, Case No. MA-9-00 (October 2000).

12.3.14 8 Management service systems and programming analyst was reclassified to a classified service systems analyst II at the same salary range. He appealed alleging that the reclassification was arbitrary, or in the alternative, that it was a demotion. The Board dismissed the appeal as untimely and dismissed the alternative appeal as inappropriate, because the action being appealed was not a demotion. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

12.3.14 9 Contracts officer in the management service appealed his reclassification. The Board dismissed the appeal for lack of subject matter jurisdiction under ORS 240.570. The Board found that the action being appealed was either a reclassification or allocation, and was outside the Board's

limited jurisdiction over non-disciplinary management service personnel action appeals. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

12.3.14 10 In dismissing the reclassification appeal of a principal executive manager A as untimely, the Board noted that the appeal would have been dismissed for lack of jurisdiction. Citing *Yandell v. Executive Department*, Case No. MA-2-85 (July 1985), the Board concluded that it did not have jurisdiction under ORS 240.570(2) to hear management service reclassification appeals. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

12.3.16 Salary Placement

12.3.16 1 A management service employee filed an appeal alleging that the State had violated a hiring agreement under which he was to receive a wage increase after one year of employment. The Board dismissed the appeal for lack of jurisdiction, citing, *Mitchell v. Teacher's Standards and Practices Commission*, Case No. MA-8-89 (August 1989), in which the Board held that an agency's failure to pay a salary increase promised to a management service employee when he had been hired was not subject to appeal under ORS 240.570(3). The Board also dismissed the appeal for lack of prosecution because the appellant failed to respond to the ALJ's dismissal warning, citing *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Savage v. Department of Transportation, Case No. MA-38-03 (February 2004).

12.3.17 Other personnel actions

12.3.17 1 A management service employee filed an appeal alleging that the State had violated a hiring agreement under which he was to receive a wage increase after one year of employment. The Board dismissed the appeal for lack of jurisdiction, citing, *Mitchell v. Teacher's Standards and Practices Commission*, Case No. MA-8-89 (August 1989), in which the Board held that an agency's failure to pay a salary increase promised to a management service employee when he had been hired was not subject to appeal under ORS 240.570(3). The Board also dismissed the appeal for lack of prosecution because the appellant failed to respond to the ALJ's dismissal warning, citing *Martin v. Fairview Training Center*, Case No. MA-3-99 (June 1999). Savage v. Department of Transportation, Case No. MA-38-03 (February 2004).

12.3.17 2 Refusal to promote and refusal to hire claims, filed by management service employees, are not within the Board's jurisdiction, the Board ruled. ORS 240.240(1) provides that management service employees are not subject to ORS chapter 240, except as provided in ORS 240.250. That statute provides that the State is to adopt rules for management service employees that "shall further merit principles" in the selection of management service personnel. The Board stated: "[a]lleged violations of ORS 240.250, however, are not among the actions that a management service employee can appeal to this Board under ORS 240.570." (Order at 3.) The Board also cited *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (November 1994), on remand from 129 Or App 565 (1994), in which it stated that the Board has "no jurisdiction to review management service personnel actions not enumerated in ORS 240.570." (Order at 7.) Rosevear and Tetzlaff v. Corrections Department, Case Nos. MA-4/6-97 (February 1998).

12.3.17 3 Claims alleging violations of ORS 240.710(1) (which prohibits the making of false statements in the State hiring process), filed by management service employees, are not within the

Board's jurisdiction, the Board ruled. In reaching that decision, the Board referred to *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (November 1994), on remand from 129 Or App 565 (1994), in which it stated that the Board has "no jurisdiction to review management service personnel actions not enumerated in ORS 240.570." (Order at 7.) Rosevear and Tetzlaff v. Corrections Department, Case Nos. MA-4/6-97 (February 1998).

12.3.17 4 The Board dismissed for lack of jurisdiction the appeal of a letter of expectations filed by a personnel officer in the management service, stating that such action is not reviewable under ORS 240.570(3) and Board Rule 115-45-023 and that the reasoning in *Morris v. Department of General Services*, Case No. MA-8-91 (September 1991) (no jurisdiction over management service employee's performance appraisal appeal) was applicable. Because it had no jurisdiction over issuance of the letter, the Board stated that it had no jurisdiction to reach Appellant's request to order the employer to remove a reference to a withdrawn letter of reprimand that was contained in the letter of expectations. Burleigh v. Department of Transportation, Case No. MA-16-96 (June 1996).

12.3.17 5 Management service employee was denied a promotion to correctional captain and appealed the denial to the Board. The Board ruled that under ORS 240.570 management service employees have the right to appeal only removal from management service, assignment, reassignment, transfer and discipline. Because denial of a promotion is not an appealable personnel action for management service employees, the Board dismissed the appeal for lack of subject matter jurisdiction Herron v. Eastern Oregon Correctional Institution, Case No. MA-5-95 (June 1995).

12.3.17 6 Campus service supervisor was denied a two-step pay increase due to inadequate performance. The Board dismissed the appeal, ruling that the Board had no jurisdiction under ORS 240.570(4) and (5) to hear an appeal concerning a pay increase denial from a management service employee. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

12.3.17 7 Contracts officer in the management service appealed his reclassification. The Board dismissed the appeal for lack of subject matter jurisdiction under ORS 240.570. The Board found that the action being appealed was either a reclassification or allocation, and was outside the Board's limited jurisdiction over non-disciplinary management service personnel action appeals. Wishart v. Adult and Family Services Division, Case No. MA-2-93 (May 1993).

12.5 Appropriateness of personnel action

12.5 1 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of

the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

12.5 2 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

12.5 3 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant

relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

12.5 4 Heavy equipment mechanic manager was removed from management service and restored to classified service for using a pellet gun to shoot and kill a pigeon in the outdoor bay of a workshop, and possessing a handgun in his private vehicle, when parked in a State lot. The Board concluded that, under the circumstances, an objectively reasonable employer would not have removed Appellant, based upon several considerations: (1) Appellant credibly interpreted the applicable State policy; (2) lesser announced discipline for the infraction was superseded by more severe discipline; and (3) Appellant was a long-term employee with a good record. (See companion entry in section 12.3.7.) The Board determined that the removal from management service violated ORS 240.570(3) but—because Appellant had not exhibited appropriate judgment in displaying the firearm to subordinates—stated that some discipline was appropriate. The Board set aside the removal and directed the employer to reinstate Appellant and make him whole "for three quarters of his lost wages and benefits, less other earnings and benefits * * *." (Order at 9.) Ash v. Transportation Department, Case No. MA-21-98 (June 2000), AWOP, 184 Or App 226, 56 P3d 968 (2002).

12.5 5 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board determined that removal was an objectively reasonable penalty, holding that all three charges were proven and that any one of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

12.5 6 Mental health supervising RN received a written reprimand for failure to disclose information to her supervisor during an investigation. The Board determined that the failure to disclose the information was contrary to Appellant's obligations as a management service employee. The Board noted that a letter of reprimand was a mild form of discipline and was an appropriate response to Appellant's failure to perform her management service responsibilities. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

12.5 7 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), stating that the employer could reasonably expect high standards of performance from a management service employee. The Board concluded that removal was reasonable given Appellant's failure to report for work regularly and on time. The Board also

affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

12.5 8 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board concluded that the removal and dismissal were not reasonable, even though the agency had cause for the discipline, because of the agency's failure to discipline Appellant in a timely manner. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

12.5 9 Correctional captain was removed from management service and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, finding that the agency's witnesses were more credible than Appellant and that the charges were substantiated and justified removal. The Board rejected Appellant's contention that he had been constructively discharged and held that the agency had provided Appellant with the requisite due process during the removal process. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

12.5 10 Campus supervisor received a two-month pay reduction and denial of a pay-step increase because of inadequate performance. The Board dismissed the pay reduction appeal (concluding that the discipline was appropriate) and the pay increase appeal (ruling that it did not have jurisdiction because management service employees cannot appeal that action under ORS 240.570(4) and (5)).Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

Chapter 13—Cause for Discipline or Removal

13.2 Absenteeism

13.2 1 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from management service under ORS 240.570(3), concluding that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" because of the excessive absences and tardiness and "misconduct" for lying about his intention to report for work and failing to notify his supervisor that he would be absent. Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

13.3 Alcohol-related conduct

13.3 1 Custodial services supervisor was removed from the management service and dismissed from the classified service for excessive absenteeism and tardiness. At least some of Appellant's attendance problems stemmed from alcohol abuse. The Board upheld the removal from management service under ORS 240.570(3), determining that the employer could reasonably expect high standards of performance from a management service employee. The Board also affirmed the

dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

13.4 Assault

13.4 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

13.5 Complaint, failure to investigate/initiate

13.5 1 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly. These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was

inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

13.7 Conduct, abusive/negative/interpersonal conflicts

13.7 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

13.7 2 A management service employee appealed removal from management service and restoration to classified service for playing a practical joke on a co-worker and being deceitful in gaining approval from his superiors to play the joke. The Board concluded that the appellant's actions and behavior in planning and executing the practical joke caused a situation perceived by the victim as embarrassing, hostile, and intimidating in violation of the harassment-free workplace policy, but that the appellant had not been deceitful because he did not hide the reason behind the joke or how he intended to carry out the joke. Dismissing appellant's argument that the policy was vague, Board stated that management employees may be held to strict standards of behavior, and it is not unreasonable to expect them to understand the policies they are required to enforce. The Board concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. The Board also found that the State did not give appellant an opportunity to respond to the allegations. The Board determined that some discipline was appropriate and ordered the appellant reinstated to his former position and made

whole, minus a one-week suspension without pay, which was the same level of discipline imposed on the other managers. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

13.7 3 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.7 4 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the

reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

13.7 5 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

13.7 6 Fish and wildlife technician was dismissed for off-duty confrontation with neighbors. When the agency investigated the incident, it discovered other instances of interpersonal conflicts with neighbors. Because Appellant lived in agency-owned housing, the Board concluded that the agency could base its disciplinary action on off-duty conduct. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

13.7 7 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his

supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board found that Appellant had been directed not to engage in conduct which would create unnecessary conflict with union representatives, and he knew that filing a Bar complaint against a union attorney and attacking the union attorney's honesty with the interest arbitrator would irreparably damage his ability to work with that attorney. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

13.7 8 State park manager was removed from the management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board set aside the removal and dismissal, concluding that the agency had cause to remove Appellant from the management service for the first two charges, which were proven, but the agency's action in doing so was not that of a "reasonable employer." The Board determined that the State had failed to discipline Appellant in a timely manner: Appellant was removed from management service because of one incident which the State had ignored for a year and because of another incident which the State had previously told Appellant had been resolved. The Board concluded that other charges, even if proven, were not sufficient to support a removal from management service. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

13.7 9 Correctional captain was removed from management service and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, concluding that the evidence substantiated the agency's charges. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

13.8 Confidential information, release of

13.8 1 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal,

reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

13.8 2 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

13.9 Conflict of interest

13.9 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgment in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive

discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.9 2 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

13.9 3 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her

removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

13.11 Document, falsification of

13.11 1 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

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not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

13.11 3 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.11 4 Revenue agent in the classified service was dismissed for falsifying records and wasting agency resources in scheduling field trips. After considering the nature of Appellant's misconduct (which he admitted) and his employment history, the Board concluded that dismissal was objectively reasonable. The Board did not find that the mitigating circumstances offered by Appellant—his poor health and medications he was taking—altered its conclusion, because there was no evidence to prove that any of Appellant's ailments or medications would have caused him to engage in misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

13.13 Ethics issues

13.13 1 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing

suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

13.13 2 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.13 3 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. Appellant, a lawyer, contended that his ethical obligations required him to file the Bar complaint and inform the interest arbitrator about it. The Board found that, while he might have been ethically required to file the complaint, the manner in which he did so—on agency stationery and in his official capacity—made the agency an unwilling and unknowing partner in the complaint. The Board also found that he had

been directed not to file such a complaint without first telling his supervisor, and that he ignored that directive. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

13.15 Information, withholding of

13.15 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.15 2 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and

reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

13.15 3 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his

dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.15 4 Mental health supervising RN received a written reprimand for failing to disclose information to supervisor during an investigation conducted by the agency. The Board dismissed the appeal, ruling that the failure to disclose the information was contrary to Appellant's obligations as a management service employee and concluding that a letter of reprimand was objectively reasonable under the circumstances. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

13.16 Insubordination (see also 3.12)

13.16 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.16 2 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the

numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

13.16 3 Principal executive manager (PEM) D appealed her reprimand for offering to hire an applicant at an unauthorized salary step. The Board denied the State's motion to dismiss the appeal on the ground that the Board does not have jurisdiction over such management service employee appeals. The Board concluded that the State's issuance of the reprimand was not unreasonable: "The discipline was imposed based on [Appellant's] exercise of poor judgment in deliberately ignoring her obligations under the hiring policy. The standards [the State] expected Appellant to conform to here are not arbitrary or unreasonable." The Board rejected Appellant's claim that the reprimand violated her due process rights, stating that she was not deprived of any property right and suffered no economic harm: "All that was required of [the State] was to give Appellant written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." Finally, the Board rejected Appellant's argument that the State violated a policy by issuing a written reprimand instead of a verbal warning, after concluding that issuance of the reprimand did not violate the management service discipline policy. Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting.

13.16 4 Management service employee was reprimanded for failing to obey an order to meet with a subordinate. Appellant argued that the order essentially required him to give preferential treatment to the subordinate, in violation of State and federal law. The Board concluded that the order did not require Appellant to violate any laws but instead was given to require him to explain to the subordinate comments made in denying the subordinate's training request. Appeal dismissed. Riley v. Veterans Affairs Department, Case No. MA-11-00 (September 2001).

13.17 Investigation, failure to cooperate/dishonesty in

13.17 1 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a

written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

13.17 2 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.17 3 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a

classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

13.17 4 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.17 5 Mental health supervising RN received a written reprimand for failing to disclose information to her supervisor during an investigation conducted by the agency. The Board dismissed the appeal, ruling that Appellant's failure to disclose the information was contrary to her obligations as a management service employee and concluding that the letter of reprimand was objectively reasonable. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

13.18 Language, inappropriate

13.18 1 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State

could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

13.18 2 Fish and wildlife technician was dismissed from his classified service position as the result of a confrontation with his neighbors at his agency-owned housing. The neighbors stated that Appellant had shouted obscenities at them. Although Appellant denied the charges, the Board found that the neighbors were more credible witnesses and affirmed the dismissal. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

13.18 3 State park manager was removed from management service and dismissed from state service for: (1) falsely telling a supervisor that a subordinate employee had made a racist statement about the manager's wife; (2) making sexually suggestive comments to a subordinate employee; (3) falsely telling a supervisor that an employee had called the manager a racial slur. The Board concluded that the agency had cause to remove Appellant from the management service for the first two charges, but set aside the discipline because the agency had failed to discipline Appellant in a timely manner: Appellant was removed from management service because of one incident which the State had ignored for a year and because of another incident which the State had previously told Appellant had been resolved. The Board found that other charges, even if proven, were not sufficient to support a removal from management service. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

13.18 4 Correctional captain was removed from management service and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, concluding that the evidence substantiated the agency's charges of inappropriate and intimidating comments. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

13.19 Leave without pay, unauthorized

13.19 1 Appellant filed an appeal alleging that she was constructively discharged. The agency contended that she had voluntarily resigned, based on a personnel rule providing that an absence without approved leave of five consecutive work days would be deemed a resignation. The Board agreed and dismissed the appeal. Merrill v. Adult and Family Services, Case No. 1260 (March 1981).

13.20 Misrepresentation

13.20 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic

abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

13.20 2 A management service employee appealed removal from management service and restoration to classified service for playing a practical joke on a co-worker and being deceitful in gaining approval from his superiors to play the joke. The Board concluded that the appellant's actions and behavior in planning and executing the practical joke caused a situation perceived by the victim as embarrassing, hostile, and intimidating in violation of the harassment-free workplace policy, but that the appellant had not been deceitful because he did not hide the reason behind the joke or how he intended to carry out the joke. Dismissing appellant's argument that the policy was vague, Board stated that management employees may be held to strict standards of behavior, and it is not unreasonable to expect them to understand the policies they are required to enforce. The Board concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior incidents demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. The Board also found that the State did not give appellant an opportunity to respond to the allegations. The Board determined that some discipline was appropriate and ordered the appellant reinstated to his former position and made whole, minus a one-week suspension without pay, which was the same level of discipline imposed on the other managers. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

13.20 3 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not

"unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

13.20 4 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

13.20 5 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him.

Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

13.20 6 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.20 7 Revenue agent in the classified service was dismissed for falsifying records and wasting the state's resources in scheduling field trips. After considering the nature of Appellant's misconduct (which he admitted) and his employment history, the Board concluded that dismissal was objectively reasonable. The Board ruled that the mitigating circumstances offered by Appellant—his poor health and medications he was taking—did not alter its conclusion because there was no evidence to prove that any of Appellant's ailments or medications would have caused him to engage in misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

13.20 8 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board found that Appellant, when questioned by the client agency about the unfair labor practice, said he did not know why it was being bifurcated, even though he had participated in the meeting at which that

strategy had been developed. The Board also found that, when discussing the client agency's concerns with his supervisor, he misrepresented those concerns. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

13.21 Off-duty conduct

13.21 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service for allegedly failing "to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order." Most of the conduct occurred while appellant was off-duty. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board reviewed the standard of proof applied to removals from management service and cited prior cases in which it held that "it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission." The Board found that the State carried its burden of proving that the appellant engaged in domestic abuse, but did not prove the other charges. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events. The Board also found that the appellant had received due process based on the notice of charges and sanctions in the predismissal letter and an opportunity to refute the charges at the predismissal hearing. The Board rejected appellant's argument that he was dismissed for political reasons, that is, the agency's fear of bad publicity, because this statutory proscription applies only to partisan politics. The Board concluded that the State acted reasonably when it dismissed the appellant based on its determination that the appellant was an inappropriate role model for police behavior and inappropriately employed as an instructor or supervisor of instructors on issues such as domestic violence. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

13.21 2 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice

and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.21 3 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his

behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

13.21 4 Fish and wildlife technician was dismissed from his classified service position as the result of an investigation into an off-duty confrontation with his neighbors. The Board determined that, because Appellant lived in agency-owned housing, his right to be free of agency intervention into his private life was diminished. The Board found that the evidence supported the agency's charge that Appellant had engaged in off-duty misconduct and that the misconduct was serious enough to warrant dismissal. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

13.21 5 Support services supervisor 2 was removed from management service and restored to a position in the classified service for several reasons, including giving her daughter keys to a state office, failing to turn in the keys in a timely fashion when she began a job rotation, violating a directive to use work time to return to the office to retrieve personal items, and going to her old office after normal work hours to use a computer. The Board affirmed the removal, concluding that certain of the proven charges established that Appellant was unable or unwilling to perform the duties of her position satisfactorily. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

13.22 Property, failure to account for/safeguard

13.22 1 Office assistant 2 was dismissed for various performance problems, the most serious being errors in customer billing records totaling $9,000. She had been reprimanded and demoted for related performance problems before the dismissal. The Board, applying the reasonable employer test, concluded that the agency had proved that Appellant was guilty of the billing records error and that the billing records error alone was a sufficient reason to sustain the dismissal. Because that error was serious enough to warrant dismissal, the Board did not consider the other charges against Appellant. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

13.23 Property, misappropriation of

13.23 1 Protective services supervisor (a program executive manager C) in the management service, with prior classified service, appealed his removal from management service and dismissal from classified service for using his State-issued cell phone for his own benefit. The Board found that the State had a policy prohibiting State employees from using State property for their own use; Appellant was aware of the policy (he had disciplined subordinates for violations of the policy); and he made several thousand dollars' of personal calls with his State-issued cell phone, some of which were made while he was on medical leave of absence. First, the Board concluded that the State "had no obligation to use progressive discipline for such a flagrant violation of its rules" and upheld the removal from management service. Second, the Board upheld the classified service termination as the act of a reasonable employer, reasoning that Appellant "grossly abused" his cell phone privilege; his assertion that he did not know who made the calls was not credible; the State's failure to warn him was inconsequential, because his misconduct was gross; and the principles of progressive discipline did not bar termination, because Appellant "consciously and voluntarily misused his State-issued cellular phone in reckless disregard of State policies and his responsibilities as a supervisor." Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

13.23 2 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

13.23 3 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.24 Property purchasing rules, violation of

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lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.25 Resident abuse

13.25 1 Psychiatric aide 1 was suspended and dismissed for abusing a resident by placing him in a cold shower. The Board upheld the suspension and dismissal, finding that Appellant's conduct constituted resident abuse and that resident abuse justified dismissal. Brady v. Fairview Training Center, Case Nos. 1051/1087 (July 1980).

13.26 Security, failure to provide proper

13.26 1 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal business use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. Because Appellant was promoted to the management service during her probationary period in a classified service position—before attaining regular status in the classified service—the Board ruled that the management service discipline standards applied. The Board determined that the State proved the first charge, which "alone is sufficient cause to warrant [Appellant's] removal from management service." Similarly, State proof of the second charge, the Board stated, "demonstrates an unwillingness or inability to perform her duties and is sufficient, standing alone, to justify her removal." Given the proof of those two charges and the fact that Appellant had not completed her classified service probationary period, the Board concluded that the State was reasonable in deciding not to restore Appellant to her former classified service probationary position. Appeal dismissed. Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

13.26 2 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly. These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

13.26 3 Campus service supervisor was reduced in pay in part for failing to effectively search for a client who left the campus. The Board dismissed the appeal, concluding that the agency had acted reasonably in disciplining Appellant for poor judgment in the search for the missing client. The Board held that the State had conducted a fair investigation into the incidents upon which discipline was based and that the discipline was not taken in reprisal for an earlier grievance. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

13.27 Sex-related conduct

13.27 1 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency

from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS 240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

13.27 2 Institution security manager was reprimanded for an inappropriate conversation with an office specialist; interference with an investigation of that conversation; untruthfulness in the investigation; and an inappropriate comment that Appellant admitted making to another office specialist. The Board, citing precedents including *Shepherd* (June 1985), determined that the State could meet its burden of proving that the reprimand was reasonable by proving only the fourth allegation. As to that charge, the Board found that Appellant, when repaying a one dollar loan to an office specialist, said to another individual "I hope she's better next time." Appellant argued that his admitted comment was intended as part of an ongoing joke concerning his frugality as a supervisor. The Board rejected that argument and stated that the comment "may be reasonably interpreted as [Appellant's] evaluation of [the office specialist's] sexual performance. . . . [Appellant] may have been joking, but the joke was not about his frugality." The Board also rejected Appellant's defense that the fourth charge was a makeweight: "The State has a clear policy of prohibiting workplace sexual harassment." Appeal dismissed. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

13.27 3 State park manager was removed from the management service and dismissed from state service for, among other charges, making sexually suggestive comments to a subordinate employee. The Board concluded that the agency proved this charge and that the charge, together with another proven charge, was grounds for removal and dismissal. However, the Board set aside the discipline because the agency had failed to discipline Appellant in a timely manner: the incident concerning the sexually suggestive comments had occurred three months earlier and the agency told Appellant at the time that the matter had been resolved. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

13.27 4 Correctional captain was removed from management service and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, finding that the evidence supported the agency's charges that Appellant had made inappropriate sexual comments. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

13.29 Sickness, absence/unsatisfactory performance due to

13.29 1 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

13.29 2 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

13.29 3 Nurse manager had a medical condition she said made it difficult for her to be at the work site and claimed that she could perform the essential functions of her position at home. The Board upheld the agency's refusal to allow Appellant to work at home, concluding that a nurse manager could not effectively hire, evaluate, make assignments or discipline from home. The Board affirmed Appellant's removal from the management service, concluding that Appellant was removed because she was unable to perform the duties of her position satisfactorily. The Board also held that it lacked jurisdiction to decide the Appellant's claims of disability discrimination. Cranor v. Fairview Training Center, Case No. MA-13-95 (February 1996).

13.31 Tardiness

13.31 1 Custodial services supervisor was removed from management service and dismissed from the classified service for excessive absenteeism and tardiness. The Board upheld the removal from

management service under ORS 240.570(3), finding that the employer could reasonably expect high standards of performance from a management service employee and could insist that Appellant report for work regularly and on time. The Board also affirmed the dismissal from classified service under ORS 240.555 for "inefficiency" and "misconduct." Peterson v. Department of General Services, Case No. MA-9-93 (March 1994).

13.33 Work break policy, abuse of

13.33 1 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

13.34 Work performance, loss of confidence in

13.34 1 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive

discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.34 2 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

13.34 3 Human resources manager appealed written reprimand and reassignment from Salem to Portland. The Board found that the appellant, while married, carried on simultaneous, off-duty, intimate relationships with two women who also worked in the Salem office of DHS; he did not supervise them; they occupied lower ranks; the relationships were consensual; and neither woman complained to management about him. The State, which learned of the relationships when one of the woman discovered the other relationship, and requested reassignment, argued that the reprimand and reassignment were justified because of the possibility of disruption in the workplace; McGee's lack of candor in informing his supervisors of the relationships; and the potential liability for discrimination complaints. The Board concluded that the evidence did not establish a nexus between McGee's off-duty conduct and a disruption in the workplace and ordered DHS to rescind the reprimand. The Board also concluded that the reassignment was disciplinary and not for the good of the service. The State appealed the Board's reassignment decision, and the court of appeals reversed the Board's order directing McGee to be reinstated and remanded the case to the Board. The court stated that the Board's decision on the reassignment issue "is not supported by substantial reason because the opinion lacks a rational explanation of the relationship between its findings and the effect of McGee's conduct on his supervisors and its revocation of the department's decision to reassign McGee. We are unaware of any general principle of logic or of law that prohibits an agency from properly exercising its authority under two discrete grants of authority from the legislature merely because it relies on the same set of circumstances for both actions. . . . We perceive nothing in the language of ORS 240.570(2) that prohibits an agency from reassigning an employee for the good of the service even though it incorrectly elects to or is unable to discipline the employee for misconduct under subsection (3)." 195 Or App at 741. On remand, the Board held that ORS

240.570(2)'s broadly-phrased language that an employer may reassign a manager bars the Board from imposing "its own views of good management practices or industrial fairness on state agency employers," and does not grant the Board the authority to second-guess the efficacy of management transfer decisions," citing *Downs v. Children's Service Divisions*, Case No. MA-12-90 (January 1992) and *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987). The Board held that the State proved it had reasonably reassigned the appellant to another management position without department-wide responsibility and outside the unit because the appellant's off-duty conduct had an adverse impact on agency operations after his supervisors lost trust in him due to his behavior. McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005).

13.34 4 A principal executive manager appealed his demotion to a position in another location for allegedly violating the department's ethics/conflict of interest policy by telling another state employee how to process appellant's relative's case, entering information about the relative into a County computer system, and being untruthful in the computer entry. Citing prior cases, the Board defined a "reasonable employer" as "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;" "clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met;" and "administers discipline in a timely manner." The Board found that the demotion was not objectively reasonable because the other employee, who was not under appellant's supervision or direction, had requested the case processing suggestions; the suggestions complied with standard case processing procedures; there was nothing in the policy that prohibited appellant's actions; the matter occurred once, over five years prior to the demotion; and the State knew of his conduct more than a year prior to the disciplinary action. The Board also held that appellant's computer entry had not violated the policy literally because the policy only applies to accessing State, not County, files. In addition, the Board held, even if the appellant had violated the spirit of the policy, he only made the entry so that benefits would not needlessly be paid; the charge of untruthfulness was based on "nit-picking;" and the department knew about the entry more than a year prior to the discipline and failed to discipline in a timely manner. The Board ordered the appellant reinstated to the position from which he had been demoted, even though that position had been reclassified. The Board also ordered the State to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute to the new location. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

13.34 5 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to

set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

13.34 6 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

13.34 7 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

13.34 8 Senior Internal Auditor 2, in the management service, was reprimanded and appealed, alleging violation of ORS 240.570(3). The Board denied the State's motion to dismiss the management service reprimand appeal on jurisdictional grounds, citing *Carter v. Corrections Department*, Case No. MA-12-99 (September 2001). After analyzing the record, the Board concluded that the State had proved two of the four charges that Appellant's conduct reflected that he was unable or unwilling to meet the standards that apply to a senior auditor. The Board stated that "a reprimand is one of the mildest forms of discipline. 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." The Board concluded that, under the circumstances, "the Department's reprimand of [Appellant] was not an excessive form of discipline and was objectively reasonable." Appeal dismissed. Hill v. Transportation Department, Case No. MA-7-02 (November 2002).

13.34 9 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. Appellant alleged that he was terminated because of false allegations made by State managers due to racial discrimination. The Board found that Appellant, a Native American, had 18 years of service with the State. Summarizing the extensive record, the Board stated that Appellant said something to an individual that caused her to believe that a third person threatened to harm people in the State's office; Appellant did not clear up the misunderstanding when given the opportunity to do so; the State terminated him for making a false and misleading statement in that conversation; Appellant had made numerous formal and informal complaints about Department employees treating him in a discriminatory manner; and his supervisors were involved in both that alleged discrimination and the decision to terminate him. Ultimately, the Board concluded, Appellant was at fault for making misleading or exaggerated statements about the third person's comments and for failing to correct the misleading impressions he gave." However, the Board stated, Appellant's history with his supervisors "tainted their ability to fairly evaluate [a central] incident. [Appellant's] supervisors were intent on terminating him and did not properly take into account mitigating circumstances." The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

13.34 10 Information resource system administrator, in the classified service, was removed from trial service and appealed, alleging violation of ORS 240.410. After ruling that Appellant had the burden of proof and going forward, the Board found that: Appellant's position required him to work cooperatively on a team; he made comments to co-workers that they thought were condescending, mocking, or demeaning; his inability to perform some tasks caused management to conclude that he was weak in required skills; and management believed that team members did not want to work with him. The Board stated that it will not set aside a trial service removal, under ORS 240.410, if it finds *any* rational basis to support an employer's good faith decision to terminate. The Board observed that Appellant "was unable to identify and follow the manner in which the Department team performed its work, and he alienated members of the team with his comments and working style." Those factors, the Board concluded, "provided a rational basis for [the State] to conclude [Appellant] was 'unable or unwilling to perform duties satisfactorily.' ORS 240.410." Concluding that there was no basis to set the removal aside, the Board dismissed the appeal. Fritz v. Administrative Services Department, IRMD GGDC, Case No. MA-2-02 (September 2002).

13.34 11 Lieutenant, the operations officer of a correctional facility, was removed from management service and returned to a sergeant's position in the classified service for knowingly failing to investigate an inmate-on-inmate assault and making comments that caused staff to stop investigating a related inmate incident. The Board found that an inmate had thrown objects at two corrections officers; senior inmates, concerned about repetition and official repercussions, beat that inmate; the State assigned Appellant to investigate; an inmate told Appellant that the senior inmates had beaten the first inmate; Appellant then stopped his investigation and told staff that the situation "had been taken care of," which they understood to mean that no further investigation was required; and Ahlstrom made a comment to staff that the visible injuries to an inmate were "what happens to inmates who throw" objects at staff. The Board concluded that State proved that Appellant failed to conduct a thorough investigation, failed to properly inquire about the inmate's injuries, and communicated to staff in a manner that deterred them from continuing the investigation. In sum, the Board stated that Appellant "did not fulfill his responsibilities of investigating inmate misconduct and ensuring the health and safety of staff and inmates. His comments to staff appeared to condone

inmate misconduct and were contrary to his responsibility to handle inmate misconduct properly. These transgressions are serious, and, at the least, constitute significant errors in judgment." The Board rejected Appellant's "scapegoat"/"different treatment" defense, reasoning that his conduct was inappropriate and the fact that others may have engaged in inappropriate conduct did not "obviate his wrongdoing or sufficiently mitigate against his removal." Appeal dismissed. Ahlstrom v. Corrections Department, Case No. MA-17-99 (October 2001).

13.34 12 Safety officer appealed his removal from five-year position in management service and dismissal from classified service for making a copy, without authorization, of a CD that contained licensed, copyrighted software and then, on four occasions during his manager's investigation, being untruthful or deceptive. The Board stated that, under ORS 240.570(5) and 240.555, "the State can lawfully dismiss a management service employee with prior classified service only where the employee's conduct would warrant termination of a classified employee." The Board reviewed precedents in which it upheld discipline imposed on management service employees who were dishonest in investigations: *Jobe* (September 1994), *Olsen* (July 1998), and *Tuthill* (August 1983). After discussing the concept of progressive discipline, the Board quoted *Shroll* (April 1982), in which it stated that it "has always dealt strictly with breaches of trust on the basis that an employer must be able to have complete confidence in the trustworthiness of its employees." The Board concluded that Appellant's length of service was not significant, given his untruthfulness in several conversations: "Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal." The Board flatly rejected Appellant's defense that he was untruthful because the investigation "put him under pressure and he panicked." The Board also rejected Appellant's defense that he was disciplined due to a prior disagreement with his supervisor about an interpretation of the law; the Board observed that the disagreement was not notably intense or personal; it occurred a month or two before the investigation ("the likelihood of a connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.34 13 Revenue agent in the classified service was dismissed by the agency for falsifying records and wasting the state's resources in scheduling field trips. Because of the relatively independent nature of Appellant's position, the Board decided that dismissal was objectively reasonable based on the agency's lack of trust and confidence in Appellant's performance resulting from his admitted misconduct. The Board decided that the mitigating circumstances offered by Appellant did not alter its conclusion because there was no evidence that Appellant's health problems or medications would have caused the misconduct. Grimes v. Public Utility Commission, Case No. MA-3-95 (September 1995).

13.34 14 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative

Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

13.34 15 Support services supervisor 2 was removed from management service and restored to a position in the classified service for several reasons, including failure to timely fill vacant positions, failure to follow directives concerning a change in the telephone system, failure to complete performance evaluations in a timely manner, exercising bad judgment concerning the security of her office keys, and failure to cross-train employees in preparation for a new program. The Board affirmed the removal, concluding that the proven charges established that Appellant was unable or unwilling to perform the duties of her position satisfactorily. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

13.34 16 Office assistant 2 was dismissed for a variety of performance problems, including customer billing errors totaling $9,000, failure to complete an equipment inventory, repeated typographical errors, and misrouting mail. She had been reprimanded and demoted for related performance problems before the dismissal. The Board, applying the reasonable employer test, concluded that the agency had proved that Appellant was guilty of the billing error, and that the billing error alone was sufficient grounds to sustain the dismissal. Because that error was serious enough to warrant dismissal, the Board did not consider the other charges against Appellant. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

13.35 Work performance, unsatisfactory

13.35 1 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

13.35 2 A management service employee appealed her removal from management service and dismissal from classified service for allegedly engaging in misconduct by entering into a business venture with an employee she supervised and retaliating against the employee; being insubordinate by being untruthful, violating a direct order, and failing to cooperate in investigations related to her conduct; and failing to effectively supervise or work with other employees. The Board first determined whether the State met its burden of proving the appellant was guilty of misconduct, insubordination, or other unfitness to render effective service under ORS 240.555. The Board found

that the appellant was not guilty of misconduct because the appellant's poor judgement in entering into a business venture with an employee that she supervised was not the equivalent of intentional misconduct and the State failed to prove its allegations that the appellant either tried to take advantage of the employee in the business venture or retaliated against the employee. The Board also found that the State failed to prove insubordination because it had not ordered the appellant to refrain from discussing the investigation with others and the appellant's failure to provide all of the documents requested by the State lacked the "willful defiance" required under ORS 240.555. The Board did find that the State had lost its trust in the appellant's ability to supervise employees as a result her history of difficulty in working with employees, of which the State had given her notice and placed her on a work plan; the high level of dissatisfaction in the department; and her inappropriate business relationship with a subordinate. The Board then applied the reasonable employer test twice, once to establish whether the State had carried its rather minor burden of justifying the removal from management service and a second time to determine if the State had established that its action was taken "in good faith for cause" under ORS 240.560(4). The Board found that the State did not act arbitrarily or unreasonably when it removed appellant from management service because the appellant was unable to effectively supervise staff, which made her unfit to render effective service as a management employee, and the State's failure to use progressive discipline was either futile or excused by the egregious nature of appellant's conduct. The Board held that the State did not act reasonably in dismissing the appellant from state service, because she was not guilty of misconduct or insubordination, and a reasonable employer would not terminate a classified employee merely because that employee had not been a good supervisor, especially in light of the State's failure to progressively discipline the appellant. The Board reinstated appellant to the classified position she held in the agency in which she had her prior classified service prior to her appointment to the management service position. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

13.35 3 The Board dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The Board stated that the primary purpose of a written reprimand, which is the mildest form of discipline the State can impose, is to provide notice to an employee and obtain correction of unacceptable behavior. The Board rejected appellant's contention that her supervisor's directives were vague. The Board held that the evidence did not support that because of medical reasons, appellant lacked the capacity to perform the work and, even if she did, she was obligated to inform the employer promptly about her work limitations, so she could obtain her supervisor's approval to modify her duties and the employer could make other arrangements to ensure the work got done. The Board also held that the State did not apply a different standard to her than it did to other managers because while some managers had performed only a few drive tests, the appellant had performed none. The Board also noted that the appellant had exceeded the scope of her objections when she had addressed the ALJ's conclusion on the counter-work issue during oral argument, since she had only filed objections to the ALJ's conclusion on the drive tests. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

13.35 4 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of

proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

13.35 5 Administrative assistant in the classified service appealed her reprimand for allegedly taking personal phone calls at work, failing to immediately find a phone number in a file she did not know existed, and failing to make a change in a letter subsequently reviewed and signed by her supervisor, an attorney. The Board concluded that the State did not prove the first charge, because Appellant's supervisor knew that Appellant had engaged in that conduct in the past and did not prohibit it. As to the second charge, the Board stated: "Giving an employee a reprimand for this type of inconsequential action is neither rational nor for cause." The Board concluded that reprimanding Appellant for the third charge was arbitrary, because it involved treating similarly-situated employees differently: while both Appellant and her supervisor had oversights regarding the letter in question, Respondent disciplined Appellant but not the supervisor. The Board ordered Respondent to set aside the reprimand. Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003).

13.35 6 Criminal inspector 3 appealed his removal from management service and placement in a classified service inspector 1 position. The Board concluded that Respondent had proven some of the numerous charges involving Appellant's integrity, work errors, failure to be forthright in addressing those work errors, disobedience, and unreasonable and illogical explanations for that disobedience. In summary, the Board stated that Respondent had been reasonable in removing Appellant to a classified position, where he would receive greater supervision. However, the Board noted that some of the charges were "almost trivial," which suggested that Appellant's "perception of some unfairness in his disciplinary process was not unreasonable," and that, at one stage, Respondent gave Appellant relatively little time to respond to the charges. Addressing the type of work Appellant performed, the Board stated: "Both the Department and subjects of an investigation have a right to expect that those who investigate violations of the rules to act with impeccable integrity and to follow the rules carefully themselves. Those parties also have a right to expect investigators to evaluate evidence accurately and with objectivity, despite their personal feelings. Reviewing the totality of the circumstances, we conclude that Fogleman did not meet those expectations" in several instances. Accordingly, the Board affirmed the removal and dismissed the appeal. Fogleman v. Corrections Department, Case No. MA-10-01 (May 2003); motion for rehearing (July 2003).

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any rational basis to support an employer's good faith decision to terminate. The Board observed that Appellant "was unable to identify and follow the manner in which the Department team performed its work, and he alienated members of the team with his comments and working style." Those factors, the Board concluded, "provided a rational basis for [the State] to conclude [Appellant] was 'unable or unwilling to perform duties satisfactorily.' ORS 240.410." Concluding that there was no basis to set the removal aside, the Board dismissed the appeal. Fritz v. Administrative Services Department, IRMD GGDC, Case No. MA-2-02 (September 2002).

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connection between . . . the dismissal and the disagreement . . . diminished as time passed"); and his dishonesty was more proximate in time to the dismissal. The Board concluded that the dismissal was objectively reasonable and dismissed the appeal. Smith v. Transportation Department, Case No. MA-4-01 (June 2001).

13.35 13 Fish and wildlife technician was given a pay reduction for failing to set an alarm at a fish hatchery. The Board found that Appellant was an experienced employee who knew that he was responsible for setting the alarm and that his failure to set the alarm was serious. The Board held that the pay reduction was not out of proportion to the offense. Appellant was also dismissed as the result of an investigation into an off-duty confrontation with his neighbors. The Board found that Appellant's actions were a significant breach of his responsibilities as an employee and tenant of the agency and affirmed the dismissal. Lawson v. Department of Fish and Wildlife, Case No. MA-15/28-94 (July 1995).

13.35 14 Office specialist I, a classified employee, was dismissed for: (1) failing to notify a trooper that he would not be needed as a witness at a trial: (2) failing to mail promptly two letters notifying owners that their cars had been towed; (3) failing to list correctly the location of an abandoned vehicle in a letter to the vehicle's owner. Applying the "reasonable employer" test, the Board dismissed the appeal, finding that the charges were proven and that the agency acted appropriately in dismissing Appellant for inefficiency, incompetence, insubordination, indolence or other unfitness to render effective service under ORS 240.555. The Board noted that the errors upon which the dismissal was based "occurred after a lengthy period during which the employee demonstrated that she was unable to competently perform the work assigned to her." (Order at 10.) Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

13.35 15 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

13.35 16 Support services supervisor 2 was removed from management service and restored to a position in the classified service for several reasons, including failure to timely fill vacant positions, failure to follow directives concerning a change in the telephone system, failure to complete performance evaluations in a timely manner, exercising bad judgment concerning the security of her office keys, and failure to cross-train employees in preparation for a new program. The Board affirmed the removal, concluding that the proven charges established that Appellant was unable or unwilling to perform the duties of her position satisfactorily. Flande v. Adult and Family Services, Case No. MA-15-93 (March 1994).

13.35 17 Office assistant 2 was dismissed for various performance problems, including customer billing errors totaling $9,000, failure to complete an equipment inventory, repeated typographical

errors, and misrouting mail. She had been reprimanded and demoted for related performance problems before the dismissal. The Board, applying the reasonable employer test, found that the agency had proved that Appellant was guilty of the billing error, and that the billing error alone was sufficient grounds to sustain the dismissal. Because that error was serious enough to warrant dismissal, the Board did not consider the other charges against Appellant. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

13.35 18 Campus service supervisor was reduce in pay for failing to effectively search for a client who left the campus and for having a visitor during work hours in violation of a directive from his superiors. The Board dismissed the appeal, concluding that the agency's investigation was fair, that there was no evidence of reprisal for Appellant's earlier grievance, and that Appellant had demonstrated poor judgment in his actions. Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

13.36 Other

13.36 1 *Possession of firearms*. Heavy equipment mechanic manager was removed from management service and restored to classified service for using a pellet gun to shoot and kill a pigeon in the outdoor bay of a workshop, and possessing a handgun in his private vehicle, when parked in a State lot. The Board concluded that, under the circumstances, an objectively reasonable employer would not have removed Appellant, based upon several considerations. *(1) Appellant's interpretation of the applicable State policy was credible*. Appellant interpreted the State policy prohibiting firearms on State property to mean that a firearm could not be in a State building, and he kept the firearm in his private vehicle, which was not used for State business; the Board found Appellant's reasoning to be "credible," because the policy is subject to that interpretation and Appellant's supervisor initially agreed with that interpretation. When the employer informed him of its contrary interpretation, he immediately conveyed that information to the employees who reported to him. As to this element of the charges, the Board stated that the employer "was not acting as a reasonable employer because it did not clearly express its expectations regarding this policy until *after* Appellant had violated the policy." (Order at 9.) *(2) The employer superseded lesser announced discipline for the infraction with more severe discipline*. Appellant admitted taking employees to his vehicle and showing the firearm to them. In response, his supervisor initially counseled him and said a discipline letter would be placed in Appellant's file. Later, however, the employer removed him from management service. Those actions, the Board concluded, were not the actions of a reasonable employer. (The Board cited a PECBA decision, *ATU v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780 (1998), where the employer suspended and then terminated an employee). *(3) Appellant was a long-term employee with a good record.* The Board noted that Appellant was a 14-year employee who had never before been disciplined. After reviewing those considerations, the Board determined that the removal from management service violated ORS 240.570(3) but—because Appellant had not exhibited appropriate judgment in displaying the firearm to subordinates—determined that some discipline was appropriate. The Board set aside the removal and directed the employer to reinstate Appellant and make him whole "for three quarters of his lost wages and benefits, less other earnings and benefits * * *." (Order at 9.) Ash v. Transportation Department, Case No. MA-21-98 (June 2000), AWOP, 184 Or App 226, 56 P3d 968 (2002).

13.36 2 Campus supervisor received a two-month pay reduction and denial of a pay-step increase because of inadequate performance. The Board dismissed the pay reduction appeal (concluding that

the discipline was appropriate) and the pay increase appeal (ruling that it did not have jurisdiction because management service employees cannot appeal that action under ORS 240.570(4) and (5)).Hopkins v. Mental Health and Developmental Disability Service Division, Case No. MA-6/23-93 (July 1993).

Chapter 15—Remedies

15.1 Make whole

15.1 1 In the appeal of a management service emp1oyee's removal from management service, although the Board found that the appellant's actions violated the harassment- free workplace policy, it concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior events demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. In addition, the Board found that the State had rushed to judgment without giving the appellant an opportunity to respond to the allegations. Finding that the appellant's conduct warranted some discipline, the Board ordered the removal set aside and the appellant made whole for lost wages and benefits, minus a one-week suspension without pay, the level of discipline given the other managers, citing *Ash v. Department of Transportation*, Case No. MA-21-98 (June 2000), *AWOP,* 184 Or App 226, 56 P3d 968 (2002) and ORS 240.560(4). Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

15.1 2 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board stated that even if the appellant had proven he was improperly laid off, he would not be entitled to monetary damages because he failed to mitigate his damages by turning down several suitable State positions. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

15.1 3 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

15.1 4 The State filed a motion to stay Board's order reinstating a management employee pending resolution of an appeal. The Board found that the State had established a "colorable claim of error" since there was a reasoned dissent to the order of reinstatement. However, the Board found that the State failed to make a showing of "irreparable injury" under ORS 183.482(3) because current employees are often displaced when reinstatement is ordered and an obligation to pay back pay is not irreparable harm. The Board also stated that the appellant had not been ordered reinstated into her prior position because it had been absorbed in the reorganization, but since the agency is in a perpetual state of reorganization allowing the reorganization to preclude reinstatement would "result in the evisceration of the remedies provided for in the" SPRL. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

15.1 5 The Board upheld the removal of a management service employee, but ordered that the appellant be restored to classified service. Because the position the appellant could claim and be appointed to was not in the record, the Board directed that an appropriate position be identified and offered to appellant. The Board ordered back pay, based on service in the classified position from the date of termination until the date appellant returned to work. If appellant refused the new position, back pay liability would end as of the date the position was offered. The Board based this remedy on its opinion in *Schellin v. Department of Veterans Affairs*, Case No. MA-17-90 (1992) at 22 n. 32. The Board ordered that the amount of back pay and benefits be calculated as described in *Oregon School Employees Association v. Klamath County School District,* Case No. C-127-84, 9 PECBR 8832, 8853 n. 28 (1986). The State then filed a motion for reconsideration and argued that the back pay award should be reduced because the appellant had received unemployment benefits and had been removed from the workforce due to attendance at school. The Board denied the motion because there was no evidence in the record regarding either matter. The Board stated that such issues would be more properly pursued during compliance proceedings before the Board, at which point the parties could introduce these facts as evidence and argue the effects of these facts on the back pay amount. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

15.1 6 ORS 240.086(2)(d) and (g): *claims that the arbitrator "exceeded their powers" and "award is in violation of law*." The State, which is required under ORS 419B.030 to maintain a registry of child-abuse investigations, challenged the portion of the arbitrator's reinstatement remedy which required the State to change or delete reports in the registry related to the grievant. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting *Woodburn Education Association v. Woodburn School District*, Case No. C-126-83, 7 PECBR 6509, 6527 (1984), the Board stated that "[a]n arbitrator 'is empowered to grant any relief reasonably fitting and necessary to remedy a *contract violation*.'" The Board concluded that "[b]ecause the order to purge the registry is not grounded in the contract, it is a remedy beyond the Arbitrator's authority." The Board also quoted from *Astoria Education Association v. Astoria School District 1*, Case No. UP-42-96, 16 PECBR 813, 821, 823 (1996), AWOP, 149 Or App 212, 942 P2d 302, 303 (1997), stating "we will refuse to enforce an award that requires the commission of an unlawful act." The Board noted that the arbitrator had used the standard of "clear and convincing" evidence in reaching her decision, but the statute only required a "reasonable suspicion" for including

reports in the registry. The Board concluded that "[t]he Arbitrator's award is contrary to law insofar as it attempts to impose a standard that is higher than the one prescribed by statute for placing material in the registry." The Board deleted the portion of the award that required the State to purge the records and modified the award to prohibit the State from using the registry contents in any way that impacted the grievant's employment. Office of Services for Children and Families v. SEIU Local 503, AR-3/4-03, 20 PECBR 829 (February 2005).

15.1 7 *ORS 240.086(2)(f): claim that arbitrator "awarded upon a matter not submitted to them."* SEIU challenged an arbitrator's award reinstating an employee, but without back pay based on the employee's failure to cooperate with the employer's investigation. The union asserted that since the employee had not been dismissed for failure to participate in the investigation, the arbitrator had based her award on a matter not submitted to her. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting from *Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 868 (1992), the Board stated that an arbitrator has substantial discretion in determining the remedy as long as it is "tailored to the violation and grounded in the contract." The Board found that the union had failed to show a violation of ORS 240.086(2)(f) because the contract gave the arbitrator broad authority to fashion a remedy, the remedy was based on the arbitration record, and the arbitrator had explained the remedy. Petition dismissed. SEIU, Local 503 v. Office of Services for Children and Families, AR-3/4-03, 20 PECBR 829 (February 2005).

15.1 8 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

15.1 9 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4),

indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

15.1 10 Appellant, a principal executive manager (PEM-D) in Hillsboro, appealed his demotion to a PEM-B in Salem. The Board ultimately ordered the State to reinstate appellant to the position from which he had been demoted and to make the appellant whole for lost wages and benefits, including reimbursement for the additional miles he had been required to commute. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

15.1 11 The agency hired Wang and agreed to pay her a pay-line exception; later—despite her outstanding performance ratings—it failed to pay her cost of living increases. She grieved and DAS directed the agency to reimburse her. The agency informed employees of that result and, minutes later, informed Wang about concerns with her work performance and the possibility that the agency could terminate her pay-line exception. The Board stated that it was convinced by the facts, "particularly . . . the timing and nature of [the agency's] actions, that [the agency's] conduct was retaliatory, not rational, and therefore arbitrary." To remedy the ORS 240.086 violation, the Board ordered the agency to cease and desist from retaliating against Wang for her grievance activity and "to reimburse Wang for lost wages and benefits . . . and ton continue to pay Wang at the top step of range 35, including any future general salary increases, unless and until such time as [the agency] properly meets the criteria for terminating [her] pay-line exception." Wang v. Geology and Mineral Industries Department, MA-12-02 (May 2003).

15.1 12 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. The Board ordered the State to reinstate Appellant, make him whole, and modify the discipline to a 30 day suspension. On the first day of the hearing, Appellant requested a continuance to obtain counsel; the Board ruled that the ALJ correctly granted that motion. In response to Appellant's motion, the State requested that no back pay be awarded to Appellant for the period of the continuance. The Board denied the State's motion: "Under the circumstances, we do not find it appropriate to penalize [Appellant] for requesting a continuance to seek legal counsel . . . ." The Board noted that Appellant had sought counsel promptly and the hearing continued as soon as possible. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

15.1 13 *Consideration of interim income from other employment*. Referring to *Plank v. Department of Transportation*, Case No. MA-17-90 (March 1992), interim compliance order (July 1992), compliance order (January 1993), the Board stated: "We modify *Plank* to the extent that we no longer will consider the *days of the week* or *times of day* that a discharged employee works, following the unlawful termination, at other employment; the significant consideration for the purpose of a make whole order is any increase in amount of *income* the employee earns from that employment. For example, if an employee worked at outside employment for eight hours per week before an unlawful

termination and, after termination, extended that employment to 40 hours per week, only the income from the 32 additional hours would be offset from the back pay owing." The Board also referred to the NLRB Casehandling Manual, section 10606. *Vilches and Central Education Association v. Central School District*, Case No. UP-74-95, compliance order 17 PECBR 792 at 801 n.11 (1998).

15.1 14 The Board set aside Appellant's removal from management service and ordered the agency to make him whole for lost wages and benefits from the date of the removal to the date he was restored to his prior position. The Board's order was based on its conclusion that the removal was "arbitrary or contrary to law or rule, or taken for political reasons" because the agency had not followed its own policy in removing Appellant from management service. The court of appeals reversed, holding that the Board reviewed the removal under the wrong standard. On remand, the Board dismissed the appeal, concluding that Appellant had been removed "in good faith for cause." Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92 (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994).

15.1 15 State park manager was removed from the management service and dismissed from state service for a variety of charges. The Board found that the agency had proven two of the charges: (1) that Appellant falsely reported that a subordinate employee had made a racist statement about Appellant's wife; and (2) that Appellant had made sexually suggestive comments to a subordinate employee. The Board set aside the discipline because the agency had failed to discipline Appellant in a timely manner: one incident was a year old and the agency had told Appellant the other incident was resolved. The Board ordered the agency to make Appellant whole for lost wages and benefits from the date of the removal to the date Appellant either accepted or declined reemployment in a comparable position. Flowers v. Parks and Recreation Department, Case No. MA-13-93 (March 1994).

15.4 Other remedies

15.4 1 In the appeal of a management service emp1oyee's removal from management service, although the Board found that the appellant's actions violated the harassment- free workplace policy, it concluded that the level of discipline imposed was not objectively reasonable because a reasonable employer would have considered that: (1) the victim's workload was partially responsible for his emotional response to the joke; (2) at least three prior events demonstrated that the appellant had not been given clear expectations that such jokes were so outside the unit culture as to cause his removal; (3) the appellant was a long-term management employee who met or exceeded expectations and had no prior disciplinary record; and (4) other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. In addition, the Board found that the State had rushed to judgment without giving the appellant an opportunity to respond to the allegations. Finding that the appellant's conduct warranted some discipline, the Board ordered the removal set aside and the appellant made whole for lost wages and benefits, minus a one-week suspension without pay, the level of discipline given the other managers, citing *Ash v. Department of Transportation*, Case No. MA-21-98 (June 2000), *AWOP*, 184 Or App 226, 56 P3d 968 (2002) and ORS 240.560(4). Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

15.4 2 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant

filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

15.4 3 ORS 240.086(2)(d) and (g): *claims that the arbitrator "exceeded their powers" and "award is in violation of law*." The State, which is required under ORS 419B.030 to maintain a registry of child-abuse investigations, challenged the portion of the arbitrator's reinstatement remedy which required the State to change or delete reports in the registry related to the grievant. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting *Woodburn Education Association v. Woodburn School District*, Case No. C-126-83, 7 PECBR 6509, 6527 (1984), the Board stated that "[a]n arbitrator 'is empowered to grant any relief reasonably fitting and necessary to remedy a *contract violation*.'" The Board concluded that "[b]ecause the order to purge the registry is not grounded in the contract, it is a remedy beyond the Arbitrator's authority." The Board also quoted from *Astoria Education Association v. Astoria School District 1*, Case No. UP-42-96, 16 PECBR 813, 821, 823 (1996), AWOP, 149 Or App 212, 942 P2d 302, 303 (1997), stating "we will refuse to enforce an award that requires the commission of an unlawful act." The Board noted that the arbitrator had used the standard of "clear and convincing" evidence in reaching her decision, but the statute only required a "reasonable suspicion" for including reports in the registry. The Board concluded that "[t]he Arbitrator's award is contrary to law insofar as it attempts to impose a standard that is higher than the one prescribed by statute for placing material in the registry." The Board deleted the portion of the award that required the State to purge the records and modified the award to prohibit the State from using the registry contents in any way that impacted the grievant's employment. Office of Services for Children and Families v. SEIU Local 503, AR-3/4-03, 20 PECBR 829 (February 2005).

15.4 4 *ORS 240.086(2)(f): claim that arbitrator "awarded upon a matter not submitted to them."* SEIU challenged an arbitrator's award reinstating an employee, but without back pay based on the employee's failure to cooperate with the employer's investigation. The union asserted that since the employee had not been dismissed for failure to participate in the investigation, the arbitrator had based her award on a matter not submitted to her. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting from *Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 868 (1992), the Board stated that an arbitrator has substantial discretion in determining the remedy as long as it is "tailored to the violation and grounded in the contract." The Board found that the union had failed to show a violation of ORS 240.086(2)(f) because the contract gave the arbitrator broad authority to

fashion a remedy, the remedy was based on the arbitration record, and the arbitrator had explained the remedy. Petition dismissed. SEIU, Local 503 v. Office of Services for Children and Families, AR-3/4-03, 20 PECBR 829 (February 2005).

15.4 5 The Board partially vacated an arbitrator's award on the grounds that it exceeded his authority and that the remedy ordered was not on a matter submitted to him by the parties. The arbitrator found that a state police officer had been reprimanded without just cause. As a remedy, the arbitrator ordered that an altered version of the officer's evaluation be rescinded and that the officer's version of the evaluation be restored, and that the officer be awarded a pay-step increase under the contract. The Board found that the arbitrator had exceeded his authority and awarded on a matter not submitted to him because he did more than simply order the reprimand rescinded. Oregon State Police v. Oregon State Police Officers' Association, Case No. AR-1-93 (June 1993).

Chapter 16—Evidentiary and Other Rulings

16.1 Authenticity of documents

16.1 1 In the appeal of a management service emp1oyee's removal from management service, the Board held that the ALJ properly admitted a prior letter of warning because it was authenticated by those with first-hand knowledge, had been received by the appellant, and was relevant to the appellant's general work history, even though it was not referred to in the removal notice. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

16.1 2 In a management service employee appeal under ORS 240.570(2), the Board ruled that the ALJ had properly (1) denied appellant's attempt to introduce evidence that the State had violated the Oregon and Federal Family Medical Leave Acts and Oregon statutes regarding violence in the workplace because the Board does not have jurisdiction over these claims; (2) denied appellant's motion for copies of other employee's personnel files and information related to meetings occurring after appellant's removal based on relevancy; and (3) refused to receive into evidence handwritten notes of a telephone conversation as not properly authenticated where the appellant had been given the notes by someone else, she did not know the identities of the speakers, and the notes appeared to be written with two different pens. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

16.2 Collateral and equitable estoppel

16.2 1 In an appeal of a removal from management service, the State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. Appellant asserted that the State should be equitably estopped from asserting that she was an executive service employee because the State had previously called her a management service employee. The Board stated that a government agency may be estopped from asserting a claim inconsistent with a position it previously took. *Department of Transportation v. Hewitt Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995). Citing to *Day v. Advanced M&D Sales, Inc*., 336 Or 511, 520, 86 P3d 678 (2004), the Board set out the elements of equitable estoppel, which are (1) a false representation; (2) made with

knowledge of the facts; (3) to a party who is ignorant of the truth; (4) with the intention that it be acted upon by the other party; and (5) the other party was induced to act upon it. The Board pointed out that for equitable estoppel to apply, the misrepresentation must be of a material fact, and not of a conclusion of law. The Board held that the State was not equitably estoppel from making its assertion because the issue of whether appellant is an executive service employee is a conclusion of law. The Board then determined that the State had failed to prove that the appellant was an executive service employee within the meaning of ORS 240.205(4) and OAR 105-10-000(24), because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

16.2 2 A grievance settlement estopped individuals from litigating their ORS 240.309 complaint that they were unlawfully hired as *temporary* employees but assigned to work as *seasonal* employees, the Board held. The Board found that the State employed Complainants as seasonal employees, represented by SEIU in a bargaining unit, until the end of September 1999; the State later hired three other individuals as temporary employees; Complainants filed a grievance alleging that the State's hiring of the other individuals violated the State-SEIU collective bargaining agreement; the State and SEIU settled the grievance with an agreement that stated that it was to "fully resolve any and all issues surrounding the" grievance and that the parties did not agree with each other's interpretation of the collective bargaining agreement; consistent with the settlement, the State offered Complainants post-season work as *temporary* employees; Complainants completed that work between November 2000 and February 2001; the post-season work was the same type as the seasonal work; and seasonal employees are entitled to certain rights and benefits not provided to temporary employees. Citing *Paulson v. Western Life Insurance Co.*, the Board stated that the elements of equitable estoppel are that the evidence establish "that (1) a false representation (albeit an innocent one) was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon [by the other party] and (5) that [the other party] acted upon it. The Board concluded that: (a) SEIU made a false representation to the State when it agreed that the settlement fully resolved "any and all issues" concerning the grievance; (b) SEIU knew the facts; © the State reasonably believed that the subject ORS 240.309 dispute was resolved by the settlement agreement; (d) SEIU intended for the State to offer post-season work to Complainants; and (e) the State did hire Complainants for that work, as temporary employees. The Board stated: "It offends equitable principles for Complainants to bargain a grievance settlement, accept the benefits of that settlement, and then initiate litigation to seek additional benefits that they failed to obtain in bargaining. The complaint is barred by estoppel and will be dismissed." In footnote 6, the Board stated that Complainants' conduct "likely violates the duty of good faith and fair dealing as well." Frost, Brown, and Hazelton v. Parks and Recreation Department, Case Nos. MA-13-00 & MA-3-01 (June 2002), AWOP 192 Or App 602, 89 P3d 95 (2004).

16.2 3 The Board ruled that the ALJ properly refused to received into evidence an Employment Appeals Board order granting Appellant unemployment benefits. The Board held that the EAB order did not have preclusive effect on Appellant's SPRL appeal, challenging his dismissal, citing ORS 657.273 and *Cooper v. Corrections Department*, Case No. UP-22-92, 14 PECBR 93, 94-98 (1992). Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

16.2 4 *Classified service termination appeal*. Respondent removed Appellant from management service and dismissed her from classified service by letter dated December 2, 1997. The letter stated that, to contest the action, Appellant was required to file a written appeal to the Department director within 15 days of the effective date of the action. Appellant did so, and the director denied the appeal. On January 12, 1998, Appellant appealed to the Board. Regarding the *classified service termination* appeal, the Board noted that ORS 240.560 and Board Rule 115-45-010(2) require such appeals to be filed "no later than 10 days after the effective date of such [dismissal] action." Appellant presented two arguments that the classified appeal was timely. First, she argued that she had followed the timelines specified in the Department's December 2 letter. The Board stated that the Department's letter "incorrectly stated that [Appellant] had 15 days in which to appeal the [classified service] termination." (Order at 4.) The Board rejected Appellant's argument, stating that to rule the classified service appeal timely "would be contrary to law and Board rule." (Order at 4.) Second, Appellant argued that the Department actually had considered her appeal, which meant that the action was not final (and "effective") until the director issued a decision on the appeal. The Board rejected that argument, stating that an action is "effective" on the date when the employer changes the employee's employment status. In this case, that date was December 2, and Appellant filed her appeal more than 10 days after that date. Appeal dismissed. As to the *management service removal* appeal, the Board initially ruled that it was timely and remanded it to an ALJ for hearing. The Board stated that the management service appeal had been filed within the 15-day period specified in Board Rule 115-45-023, which provided that such filings were to occur "no later than 15 days after receiving written notification of the final decision of the agency head." (See companion entries in sections 1.3, 12.3.1, and 12.3.8.) In her October 1998 dissent, Member Whalen argued that the Department "improperly characterized Smith's termination from state service as involving two distinct personnel actions" (Order at 9) and that the termination "is properly viewed as a single personnel action—dismissal—because of her status in state service" and the terms of ORS 240.570(5). (Order at 10.) Member Whalen also argued that principles of estoppel rendered timely the classified service dismissal appeal. As a result, Member Whalen stated that the appeal was timely and warranted a hearing. Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000).

16.3 Confidentiality

16.3 1 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. The State, asserting the Public Records Law, moved to seal portions of the record involving testimony about discipline imposed on another State employee. After reviewing precedents, the Board ruled that the ALJ had acted within his discretion in entering a protective order; the Board quoted that order in its decision. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

16.4 Credibility

16.4 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service. The Board held that while both the appellant and the other person involved in the domestic abuse incident had significant credibility problems, contemporaneous statements and physical evidence supported the other person's version of events.

The Board ultimately concluded that the State acted reasonably when it dismissed the appellant. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

16.4 2 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board ordered the State to rescind the appellant's removal. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

16.4 3 In the appeal of a management service employee, the Board concluded that the State failed to prove its allegation that appellant told an employee not to leave her desk for any reason, not even to go to the bathroom, because the appellant denied the incident took place, investigative documents make no reference to the incident, and the State did not call the employee as a witness. The Board held that a document which included a statement allegedly made by the employee to a manager, which the State introduced into evidence, was not admitted to prove the truth of its contents because it was not a sworn statement. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

16.4 4 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service, for allegedly: (1) accessing her ex-husband's confidential wage records for personal use (she had requested her ex-husband to change his child support payments for their son); (2) falsifying a performance appraisal (after a superior signed a performance appraisal for one employee, Appellant made changes to it and cut and pasted the superior's signature from another appraisal); (3) using State equipment for personal use (emailing her attorney about the child support issue); and (4) inappropriately commingling personal and work records. One State witness testified that she had seen Appellant with a printout of the ex-husband's confidential wage records; Appellant denied that she had such a printout. The Board resolved the conflict, in footnote 6: "[Appellant] has a clear interest in denying [the witness's] version of the events. [The witness] had no animosity towards [Appellant] and nothing to gain by her testimony. Because of her neutrality, we find that [the witness's] testimony more credible than [Appellant's]." Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

16.4 5 Principal executive manager D appealed her removal from management service, and failure to reinstate her to classified service. In footnote 11, the Board stated: "Having concluded that [Appellant's] testimony [regarding one charge] was not credible, we view the remainder of her testimony with suspicion. *Clatsop Community College Faculty Association v. Clatsop County Community College*, Case No. C-55-82, 7 PECBR 6012, 6029 (1983) (when a witness's testimony is false in one part, the rest of that witness's testimony should be distrusted)." Wesley v. Employment Department, Case No. MA-20-02 (October 2003).

16.4 6 Fish and wildlife technician was dismissed from his classified service position as the result of an investigation into an off-duty confrontation with his neighbors. The agency's investigation revealed that Appellant had shouted obscenities at the neighbors and had repeatedly clashed with his

neighbors over the years. The Board found that Appellant's denials were not credible. The dismissal was affirmed. Lawson v. Department of Fish and Wildlife, Case Nos. MA-15/28-94 (July 1995).

16.4 7 Mental health supervising RN received a written reprimand for failing disclose information to her supervisor during an investigation. Concerning Appellant's contention that she did not have the information being sought by her supervisor, the Board found that Appellant was less credible than the agency's witnesses. The Board concluded the letter of reprimand was objectively reasonable and dismissed the appeal. Jobe v. Oregon State Hospital, Case No. MA-7-94 (September 1994).

16.4 8 Correctional captain was removed from management service and restored to a classified service position as a correctional officer for making sexually suggestive comments and intimidating remarks to subordinate employees. The Board upheld the removal, finding that the agency's witnesses were more credible than Appellant. In a discussion about the credibility of witnesses, the Board noted that in proceedings of this type, credibility determinations often determine the outcome. The Board found that the testimony of the agency witnesses was consistent on key points and that they had no reason to fabricate their testimony. Mosley v. Department of Corrections, Case No. MA-7-93 (November 1993).

16.5 Hearsay

16.5 1 In the appeal of a management service employee, the Board concluded that the State failed to prove its allegation that appellant told an employee not to leave her desk for any reason, not even to go to the bathroom, because the appellant denied the incident took place, investigative documents make no reference to the incident, and the State did not call the employee as a witness. The Board held that a document which included a statement allegedly made by the employee to a manager, which the State introduced into evidence, was not admitted to prove the truth of its contents because it was not a sworn statement. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

16.5 2 Appellant objected to documents involving appealed reprimand as hearsay. After citing its general evidence rule, Board Rule 115-10-050(1), the Board stated that it, in cited precedents, it considered hearsay when corroborated by testimony. The Board ruled that the ALJ correctly sustained hearsay objections to many of the State's exhibits but received them as documents relied upon by State managers. Carter v. Corrections Department, Case No. MA-12-99, Member Thomas concurring and dissenting (September 2001).

16.6 Laches

16.6 1 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board determined that the motion was not barred by laches because the analogous statute of limitations was an action for remedies on a judgment in a civil case (10 years limitations period) and the State failed to prove that it had suffered substantial prejudice due to appellant's delay. The Board ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her

claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

16.7 Notice of imposition of discipline not appealed

16.7 1 Office assistant 2 was dismissed for various performance problems, including customer billing record errors totaling $9,000. She had been reprimanded and demoted for related performance problems before the dismissal, and had not appealed either of the prior disciplinary actions. After concluding that the dismissal was warranted using the reasonable employer test, the Board also ruled that Appellant could not contest the demotion in the appeal of her dismissal because she had not timely appealed the demotion. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

16.9 Relevance

16.9 1 In the appeal of a management service emp1oyee's removal from management service, the Board held that the ALJ properly admitted a prior letter of warning because it was authenticated by those with first-hand knowledge, had been received by the appellant, and was relevant to the appellant's general work history, even though it was not referred to in the removal notice. Belcher v. Department of Human Services, Oregon State Hospital, Case No. MA-7-07 (June 2008).

16.9 2 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board denied the appellant's request to reopen the record after the recommended order was issued to present evidence that the employee who had bumped into his position was subsequently removed, ruling that it was the circumstances that existed at the time the State's decision was made that were relevant. The Board also denied the appellant's motion to clarify and/or file new objections after oral argument ruling that new objections at such a late date would be untimely and the appellant had not shown good cause for an extension of time. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

16.9 3 The Board granted the State's motion to disregard the reference to an exhibit in the Union's brief because the Union is not entitled to challenge the arbitrator's factual findings under ORS 240.086(2). Department of Transportation v. SEIU, Local 503, Case No. AR-1-06, 21 PECBR 838 (May 2007).

16.9 4 In a management service employee appeal under ORS 240.570(2), the Board ruled that the ALJ had properly (1) denied appellant's attempt to introduce evidence that the State had violated the Oregon and Federal Family Medical Leave Acts and Oregon statutes regarding violence in the workplace because the Board does not have jurisdiction over these claims; (2) denied appellant's motion for copies of other employee's personnel files and information related to meetings occurring after appellant's removal based on relevancy; and (3) refused to receive into evidence handwritten notes of a telephone conversation as not properly authenticated where the appellant had been given the notes by someone else, she did not know the identities of the speakers, and the notes appeared to be written with two different pens. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member

Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

16.9 5 A program technician employee, in a classified position, appealed removal from trial service for alleged lack of productivity and failure to follow lead workers' and supervisors' directions. After he filed the appeal, his removal was rescinded and reissued. The employee appealed the reissued removal and the parties agreed to proceed to hearing on the date scheduled for the original appeal. The Board upheld the following rulings of the ALJ: (1) even though the appellant bore the burden of proof and the burden of going forward with the evidence, requiring the State to present its case first was appropriate to expedite the hearing and did not shift the burden of proof; (2) appellant's work reports offered subsequent to the hearing were not relevant since the State had not seen the reports at the time it made its decision to remove him; and (3) evidence of appellant's personal use of his work e-mail and computer, which the State became aware of after his removal, was received as relevant only to the possible remedy of reinstatement. The Board found that the State had provided sufficient direction to satisfy standards applicable to a trial service employee and that the appellant was aware of his supervisors' concerns and had failed to address them. The Board held that the appellant's low productivity and resistance to following directions provided a rational basis to support the State's decision under ORS 240.410. Williams v. Department of Energy, Case No. MA-14-04 (January 2005).

16.9 6 Labor relations manager was removed from management service and dismissed from state service for: (1) filing an Oregon State Bar complaint against a union attorney, contrary to his supervisor's directives; (2) making an ex parte contact with an interest arbitrator and impugning the honesty of the union's representative, contrary to his supervisor's directives; (3) misrepresenting to a client agency the reasons an unfair labor practice complaint was being bifurcated, and misrepresenting to his supervisor the client agency's questions about the matter. Before the hearing, the agency's motions to quash Appellant's subpoenas were partially sustained for the reason that the subpoenas sought information not generally relevant to the issues in the case. Appellant also filed a motion in limine seeking to limit the evidence presented by the agency to that used as a basis for removal; that motion was denied for the reason that other evidence offered might be relevant to the issue of the appropriateness of the removal even though it was not considered as a basis for the removal. The Board granted a motion to strike testimony from Appellant's supervisor about his relationships with co-workers as irrelevant. The Board also ruled that testimony was relevant and should have been admitted that a union representative claimed after the removal that the union representative's complaints about Appellant had resulted in the removal; the Board decided that even if admitted the testimony would not have affected the result. The Board affirmed the removal, holding that all three charges were proven and that any of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

16.9 7 The agency petitioned for review of an arbitration award. At the hearing, the agency offered as exhibits all the exhibits and post-hearing briefs from the arbitration hearing. The Board ruled that, in an arbitration award review case, the only relevant evidence is the contract, the arbitration award, and evidence relevant to a claimed public policy violation. The offered exhibits were not received. Department of Corrections v. AFSCME Council 75, Local 2623, Case No. AR-1-92 (September 1992), ruling on motion (February 1993), appeal withdrawn (March 1993).

16.10 Res judicata

16.10 1 The Board ruled that the ALJ properly refused to received into evidence an Employment Appeals Board order granting Appellant unemployment benefits. The Board held that the EAB order did not have preclusive effect on Appellant's SPRL appeal, challenging his dismissal, citing ORS 657.273 and *Cooper v. Corrections Department*, Case No. UP-22-92, 14 PECBR 93, 94-98 (1992). Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003).

16.12 Timeliness (see also 5.2.2)

16.12 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. The Board denied the appellant's request to reopen the record after the recommended order was issued to present evidence that the employee who had bumped into his position was subsequently removed, ruling that it was the circumstances that existed at the time the State's decision was made that were relevant. The Board also denied the appellant's motion to clarify and/or file new objections after oral argument ruling that new objections at such a late date would be untimely and the appellant had not shown good cause for an extension of time. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

16.12 2 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

16.12 3 The Board dismissed a management service employee's appeal of a reprimand for untimeliness and lack of prosecution citing *McMinnville Firefighters Association v. City of McMinnville*, Case No UP-4-94, 15 PECBR 83 (1994). The Board found that the information received with the appeal showed that the appeal had been received by the Board 31 days after the reprimand was issued and the appellant had failed to respond to the ALJ's notice that the appeal would be dismissed unless she provided information which showed that her appeal was timely filed. Moriarty v. Department of Human Services, Case No. MA-4-06 (October 2006).

16.12 4 The ALJ's recommended order dismissed the appeal of a customer service manager who was reprimanded for failing to conduct drive tests and perform counter work as directed. The appellant filed timely written objections only to the ALJ's conclusion that she had not conducted sufficient

drive tests, but then focused on the conclusions regarding her failure to perform counter work during oral argument. The Board held that since the appellant had exceeded the scope of her written objections, it would normally impose the sanction of refusing to consider objections which did not meet the timeliness requirements of OAR 115-45-040(2), citing *Portland Federation of Teachers v. Portland Public School District No. 1 and Oregon School Employees Association*, Case No. C-76-78, 4 PECBR 2290, 2293 (1979); and *Teamsters Local Union 670 v. Linn County Parks and Recreation Department*, Case No. C-40-80, 5 PECBR 3081 (1980). However, here the Board decided that since it had found that the State acted reasonably in reprimanding appellant for failing to perform the drive tests, it would not address the counter-work issue at all. Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006).

16.12 5 Temporary employee—employed in a temporary position from September 14, 1999 to July 21, 2000—filed a complaint on August 1, 2000, alleging that his temporary employment exceeded six months, in violation of ORS 240.309. The State asserted that the complaint was untimely under Board Rule 115-45-017(2), which provided: "The complaint must be filed with the Board no later than 30 days after the employee knew or should have known of the action being appealed." After reviewing the rule in the context of ORS 240.307 and *Huff v. Great Western Seed Co.*, 322 Or 457, 461 n. 3 (1996), the Board concluded that the rule was invalid. In addition, the Board stated that "[b]ecause ORS 240.307 does not contain a discovery rule ["knew or should have known of the action"], it was improper for this Board to enact a rule that included one. Where we find that an administrative rule is not in accordance with the statute, we are obliged to defer to the statute." Accordingly, the Board did not apply the rule and used the approach from *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000): the 30-day time period for a complaint alleging a violation of ORS 240.309 begins on the temporary employee's termination date. Under that approach, the Board ruled that Complainant's appeal was timely. Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

16.12 6 A temporary employee filed an appeal alleging that he had been denied permanent employment in violation of ORS 240.309. The Board dismissed the appeal as untimely because it was filed more than 15 days after the end of Appellant's temporary employment. The Board ruled that, in order to obtain review under OAR 115-45-017, as the rule regarding temporary appointments was phrased at the time, an appeal had to be filed with the Board "[n]o later than 15 days after receipt by the employee of the final decision of the Agency Head," and that the "final decision" referred to in this rule was the agency head's decision to allow the temporary employment to end. Gibson v. Eastern Oregon Psychiatric Center, Training Center, and Support Services, Case No. MA-14-95 (October 1995).

16.12 7 Correctional food service manager, a management service employee, was demoted to a position in the classified service. The Board dismissed the appeal of her demotion under OAR 115-45-023(2) as untimely because it was filed more than 15 days from the date on which she received the final decision of the agency head. Appellant had filed her appeal with the wrong agency and was not notified of her error until after the deadline for filing with the Board had passed. The Board noted that the deadlines for filing under the SPRL are jurisdictional, and had always been strictly applied. Nelson v. Department of Corrections, Case No. MA-36-94 (January 1995).

16.12 8 Supervising accountant appealed her disciplinary removal from management service. OAR 115-45-023 requires that such appeals be filed within 15 days of the date the appellant received the agency head's final decision on the appeal. The Board dismissed the appeal as untimely because it was not filed within the required 15 days. The Board noted that it has always strictly construed the filing deadlines and that the deadlines are jurisdictional. Shepard-Lamb v. Adult and Family Services Division, Case No. MA-29-94 (October 1994).

16.12 9 Classified employee appealed a six-month, one grade pay reduction. The Board dismissed the appeal as untimely under ORS 240.560(1) and OAR 115-45-010(1) because it was not filed with the Board within the required 10 days. Citing *Phillips v. Worker's Compensation Department*, Case No. 1463 (1984), the Board rejected the appellant's argument that the appeal should be considered timely because she notified her supervisor within 10 days that she wanted to appeal the pay reduction to the Board. Wilson v. Oregon State Police, Case No. MA-4-94 (May 1994).

16.12 10 The Board dismissed as untimely the appeal filed by a systems and programming supervisor concerning his nondisciplinary removal from management service and work schedule change. Appellant conceded that his appeal had not been *received* by the Board within 15 days of the agency head's response, as required by Board rules, but argued that he had relied on an agency rule which had only required that the appeal be *sent* within the 15 day time limit. The Board rejected that argument, noting that agency policies could not be used to extend the time limit contained in Board rules. Brenner v. Portland State University, Office of Information Systems, Case No. MA-3-94 (March 1994).

16.12 11 Office assistant 2 was dismissed for various performance problems, including customer billing record errors totaling $9,000. She had been reprimanded and demoted for related performance problems before the dismissal, but had not appealed either disciplinary action. Appellant claimed that her due process rights had been violated by the agency because she had not been given a hearing before the demotion. After sustaining the dismissal, the Board ruled that Appellant's due process claims concerning the demotion were untimely because she had not appealed the demotion. Driver v. Travel Information Council, Case No. MA-19-92 (January 1994).

16.12 12 The Board dismissed as untimely the appeal of a principal executive manager A challenging the agency's refusal to consider her request for reclassification to principal executive manager B during a reorganization. The Board rejected the Appellant's argument that the agency's grievance procedure, which provided that appeals to the Board had to be "submitted" within 15 days of the final management decision, impliedly waived the Board's time deadline, which requires that appeals be received within 15 days of the final management decision. Butler v. Adult & Family Services Division, Case No. MA-20-92 (February 1993).

16.12 13 The Board dismissed an appeal concerning calculation of service credits and demotion. Appellant did not file the appeal with the Board within 15 days of receiving the response from the Executive Department, as required by Board Rule 115-45-015. Robinson v. Adult and Family Services Division, Case No. 1343 (July 1981).

16.12 14 The Board dismissed an appeal under ORS 240.560 because it was filed more than 10 days after the effective date of a personnel action. The Board noted that the appeal had been mistakenly sent to another state agency but concluded that even if receipt by that agency was considered the

filing date, the appeal was untimely. Russell v. Department of Transportation, Case No. 1286 (May 1981).

16.13 Other

16.13 1 A law enforcement academy training supervisor appealed removal from management service and dismissal from classified service. At the appellant's request, the ALJ postponed the hearing until the criminal charges were resolved. Appellant was acquitted of criminal charges for his conduct. The Board ultimately concluded that the State acted reasonably when it dismissed the appellant. Herbst v. Department of Public Safety Standards and Training, Case No. MA-5-06 (October 2008).

16.13 2 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

16.13 3 The Board granted the State's motion to disregard the reference to an exhibit in the Union's brief because the Union is not entitled to challenge the arbitrator's factual findings under ORS 240.086(2). Department of Transportation v. SEIU, Local 503, Case No. AR-1-06, 21 PECBR 838 (May 2007).

16.13 4 After the State appealed the Board's decision that it had unlawfully removed the appellant from management service under ORS 240.570(2), the parties settled the matter. Pursuant to the settlement, the State filed a motion with the Board to vacate the order, which was joined in by the appellant. Citing *City of Eugene v. PERB*, 341 Or 120, 137 P3d 1288 (2006), the Board held that when the State settled the matter, it voluntarily relinquished its legal remedy and thereby surrendered its claim to equitable relief. The Board stated that vacatur was not appropriate because "[i]t is an extraordinary remedy to which a party must show equitable entitlement." Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 31, 2005), Ruling on Motion to Stay (March 13, 2006), recons (March 2007).

16.13 5 In the appeal of a management service employee, the Board concluded that the State failed to prove its allegation that appellant told an employee not to leave her desk for any reason, not even to go to the bathroom, because the appellant denied the incident took place, investigative documents make no reference to the incident, and the State did not call the employee as a witness. The Board

held that a document which included a statement allegedly made by the employee to a manager, which the State introduced into evidence, was not admitted to prove the truth of its contents because it was not a sworn statement. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

16.13 6 Where the State removed appellant from management service and dismissed her from state service under ORS 240.570(5), which applies to management service employees with immediate prior classified service, but no evidence was presented at the hearing regarding her immediate prior classified status, the Board assumed that the appellant had such prior status. Greenwood v. Oregon Department of Forestry, Case No MA-3-04 (July 2006), recons denied (September 2006).

16.13 7 Appellant filed an appeal over removal from management service. The State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. In the interim order on jurisdiction, the Board determined that the State had failed to prove that the appellant was an executive service employee within the meaning of ORS 240.205(4) and OAR 105-10-000(24), because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute. Citing *Arlington Education Association v. Arlington School District*, 177 Or App 658, 668-69, 34 P3d 1197 (2001), *rev den*, 333 Or 399, 42 P3d 1243, 1244 (2002), the Board stated that it would not speculate about whether the director gave the approval because its review is confined to the factual record, which includes evidence developed by the parties at hearing, stipulations of the parties, and matters subject to official notice. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

16.13 8 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

16.13 9 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding

Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

16.13 10 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. The State, asserting the Public Records Law, moved to seal portions of the record involving testimony about discipline imposed on another State employee. After reviewing precedents, the Board ruled that the ALJ had acted within his discretion in entering a protective order; the Board quoted that order in its decision. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

16.13 11 *Audiotapes*. The Board stated that it generally will not receive audiotapes as evidence. Instead, it stated that it "will accept as an exhibit a transcript of an excerpt of a tape, provided that: (a) the transcriptionist signs a notarized statement that the document is a verbatim transcript of the identified tape, and (b) the party provides the opposing party with a copy of the transcript and the full tape from which it was derived sufficiently before the hearing to give the opposing party an opportunity to review the tape and transcript. A reasonable time for such disclosure generally is no less than 14 days before hearing." (Order at 5.) Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

16.13 12 *Prima facie case.* The Board stated, in footnote 5: "A 'prima facie' case is defined as: 'Such as will prevail until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to [the] contrary is disregarded.'" (Order at 6.) *Black's Law Dictionary* (West abridged sixth edition 1991)." Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

16.13 13 *Alternate hearing procedure* agreed upon by parties: pre-hearing exchange of sworn affidavits with cross-examination of affiants during telephone hearing. (The Board noted that the Appellants, who had been laid off by PUC, resided in Klamath Falls.) Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case Nos. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting.

16.13 14 The Board dismissed the appeal of a mental health therapy technician employed in a temporary position for more than 20 months. The agency admitted that it had failed to file the required forms needed to report the extension of his temporary employment, but the Board found that the agency had the authority to extend Appellant's employment under ORS 240.309(4). The Board concluded that the agency's failure to file the required forms did not make Appellant's continuing

employment unlawful under ORS 240.309, and that there was no evidence that Appellant had been denied a permanent position because of his temporary status. Trotts v. Oregon State Hospital, Case No. MA-9-95 (October 1995).

16.13 15 Board dismissed Appellant's motion at oral argument to remand the case to the administrative law judge to receive additional evidence, noting that the evidence was available to Appellant at the time of hearing. Wilson v. Oregon State Police, Case No. MA-30-94 (June 1995).

16.13 16 Labor relations manager was removed from management service and dismissed from state service. Several days before oral argument on objections to the recommended order, Appellant submitted a document he claimed was an index to prehearing tapes and hearing exhibits; the agency objected that the document was untimely written argument. The Board refused to receive the document. Several days after oral argument, Appellant requested that the hearing be reopened; in support of his request, he submitted a newspaper article with comments from his former supervisor. The Board denied the request to reopen the hearing because that individual had testified at length in the hearing. The Board affirmed the removal, holding that the charges against Appellant were proven and that any one of them would have been sufficient to warrant removal. Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93 (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995).

16.13 17 Lack of prosecution. Cases which were dismissed for want of prosecution after Appellants failed to respond to requests of the administrative law judge for additional information: Western v. Vocational Rehabilitation Division, Case No. MA-14-93/management service removal (October 1993); Tarnay v. Oregon Department of Transportation, Case No. MA-9-94/classified service dismissal (August 1994); Tenderella v. Department of Corrections, Case No. MA-13-94/classified service dismissal (September 1994); Young v. Office of Educational Policy and Planning, Case No. MA-22-94/classified employee appeal (September 1994); Kirsch v. Public Utility Commission, Case No. MA-30-94/classified service personnel action (September 1994); Hopkins v. Fairview Training Center, Case No. MA-10-93 (November 1994); Bassetti v. Children's Services Division, Case No. MA-31-94 (November 1994).

16.13 18 The Board dismissed the appeal of a removal from management service and dismissal for failure to respond to the administrative law judge's requests for information. The appeal was later reinstated by the Board on Appellant's motion, based on Appellant's representation that he was in the processing of moving at the time of the administrative law judge's inquiries, and had no fixed address. The Board later rendered a final decision affirming the removal and dismissal. Peterson v. Department of General Services, Case No. MA-9-93 (April 1993), ruling on reconsideration (May 1993), decision on the merits (March 1994).

16.13 19 The Board dismissed the appeal of a termination filed by a temporary employee concerning his termination. The Board held that its jurisdiction over appeals from temporary employees was limited to considering whether the agency's action violated ORS 240.309. Smith v. Fairview Training Center, Case No. MA-22-93 (February 1994).

16.13 20 The Board requested Appellant to withdraw the appeal after being notified by the agency that the disciplinary actions at issue had been rescinded. When Appellant did not respond, the Board dismissed the appeals. Seufert v. Employment Division, Case Nos. 1231/1240 (November 1982).

16.13 21 The Board granted a motion to withdraw an appeal based on Appellant's letter that she and the agency had settled her claim. Donaldson v. Adult and Family Services Division, Case No. 1098 (March 1981).

16.14 Legislative history (classification new in 1996; includes only cases after that date)

16.14 1 Testimony about the meaning of the temporary employment statute, ORS 240.309, from former legislators and a former union political director was properly excluded by the ALJ, the Board ruled. The Board stated: "If a statute is not clear on its face, the best evidence of legislative history is the legislative record: recorded testimony, various reports, and meeting minutes. After-the-fact testimony from legislators or legislative witnesses about what they meant by certain legislation is not useful in determining the intent of the legislature as a whole." Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002). See also Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002).

16.14 2 Temporary employee, who was employed in a temporary position for over ten months, filed a complaint alleging that his temporary employment exceeded six months, in violation of ORS 240.309. Following an analysis used in *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000), the Board determined that the State did not employ Complainant either for an emergency or to replace an employee on leave and concluded that the State employed him for longer that six months, contrary to ORS 240.309. To remedy the violation, the Board reviewed the legislative history of the statute and ordered the State to pay Complainant the difference between his temporary employee pay and the pay and benefits he would have earned if employed as a regular employee, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. In addition, the Board ordered the State to cease and desist from employing temporary personnel in violation of the law. In its supplemental order, the Board ordered the State to reimburse Complainant for his actual medical and dental costs incurred as a result of not receiving such through insurance as a regular employee, including premium payments and out-of-pocket costs, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

16.14 3 Legislative history of ORS 240.307 and 240.309 (employment of temporary employees) was reviewed by Member Thomas, in dissent. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

16.14 4 Legislative history of ORS 240.307 and 240.309 (employment of temporary employees) was reviewed by Member Thomas, in dissent. Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

16.14 5 Senate Bill 1149 (1995) legislative history ruled irrelevant and not received in a classified employee's appeal of PUC's failure to transfer him to DOT. The Board reviewed ORS 236.610, which provided that public employees shall not "be deprived of employment solely because the

duties of employment have been assumed or acquired by *another* public employer * * *." (Emphasis added.) The Board concluded that the transfer statute "was intended to address the transfer of positions from one *political jurisdiction* to another." (Order at 13.) In doing so, the Board determined that PUC and DOT are agencies of the same employer, the State of Oregon. Accordingly, the Board did not consider the offered legislative history of the 1995 statute. Reynolds v. PUC, Case No. MA-23-95 (November 1996).

16.15 Statutory interpretation (classification new in 1996; includes only cases after that date)

16.15 1 The Board dismissed the appeal of a classified employee who had been laid off after another employee with higher service credits bumped into his position pursuant to the DAS state-wide layoff policy. Since the parties did not raise the issue, the Board assumed, but did not specifically decide, that the authorization to review violations of "rules" under ORS 240.086(1) applied to violations of state policies as well as administrative rules and that failure to uniformly apply a policy could be an "arbitrary" action under ORS 240.086(1). The Board concluded that the State, which may "interpret and flesh out the policy in a reasonable fashion," had acted consistently with its prior interpretation and application of the layoff policy and reasonably interpreted the policy to allow an employee who is bumping into a position and the supervisor to determine if the employee is capable of performing the position's duties within 30 days. The Board found that the appellant failed to meet his burden of proving that the State's decision that the employee was qualified for the appellant's position was arbitrary. The Board also ruled that the State did not act arbitrarily when it required the appellant to provide documentation to support his decision to turn down a position for which he had originally agreed he was qualified. The Board also stated that even if the appellant had proven he was improperly laid off, he would not be entitled to monetary damages because he failed to mitigate his damages by turning down several suitable State positions. Hays v. Department of Administrative Services, Case No. MA-11-06 (December 2007).

16.15 2 In 2004, the Board rescinded appellant's removal from management service and ordered payment of back pay and benefits as part of a make whole remedy. Three years later, the appellant filed a motion to enforce the Board's order, alleging that the State had wrongfully reduced her back pay by the amount of her unemployment benefits. The Board held that the authority to enforce its orders is inherent in its statutory authority to award remedies under the SPRL. The Board noted that under *Zottola v. Three Rivers School District*, 342 Or 118, 149 P3d 115 (2006), the State was not entitled to deduct unemployment benefits from the award. The Board dismissed the State's defenses that the motion should be treated as a new case subject to the 30-day limitations period, a request for reconsideration subject to the 14-day limitations period, or a petition for judicial review subject to the 60-day limitations period. The Board held that the appellant had not abandoned her claim because abandonment cannot be proven solely by the lapse of time. The Board also determined that the motion was not barred by laches and ordered the State to pay appellant the amount it had withheld, but denied appellant's claim for interest because she delayed in pursuing her claim. Nass v. Employment Department, Case No. MA-6-03 (February 2004) order on motion to enforce remedy (October 2007).

16.15 3 A human resource analyst, with no prior classified service, appealed removal from management service for allegedly revealing confidential personnel information to an HR manager in another state agency and other prior misconduct. Noting that the term "duties" is not defined in ORS 240.570(3), the Board explained that while the State establishes an employee's "duties," and the

standards of behavior "can be strict" for management employees, the State's authority is not "unfettered" and must be "objectively reasonable." The Board found that the State had not carried its burden of proof because no policy restricted the release of the information, and this was not a type of situation where an unwritten rule was "so basic and universally known that there need not be a written or express rule." The Board determined that the charge of appellant's untruthfulness during the investigation was based solely on different understandings of what was said by the two individuals involved in the conversation and, citing *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 67 (1977), stated "when we are faced with equally persuasive evidence, we rule[] against the party with the burden of proof." The Board also found that the State had not raised the other alleged prior misconduct in a timely manner. The Board ordered the State to rescind the appellant's removal, reinstate her, and make appellant whole. Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007).

16.15 4 A management service employee appealed removal from management service allegedly due to a reorganization or lack of work under ORS 240.570(2). The appellant's burden was to prove that the removal was done in bad faith and not due to the reorganization and the State had the burden of proving that the reorganization was legitimate and the appellant's termination a good faith result of the reorganization. The Board found that the State had removed the appellant "for disciplinary reasons without following the procedures or standards that govern such removals" and that the removal "was done in bad faith and violated Fery's rights under ORS 240.570(3)." The Board held that its job was to decide the employer's motivation for the appellant's removal based on the evidence presented. In considering whether there was a legitimate reorganization, the Board applied the standard that the "reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose" and found that the reorganization "lacked good faith and was a pretext for a disciplinary removal." The Board discussed the legislature's intent to distinguish between terminating employees for personal and nonpersonal reasons under the SPRL. The Board based its conclusion that the State did not remove the appellant due to reorganization or lack of work on evidence that the State was proceeding with a disciplinary process at the same time appellant was allegedly removed due to the reorganization; that management had embarked on a campaign to humiliate and ostracize appellant; that appellant was transferred to a position that was intended to precipitate her resignation; that appellant was laid off four months after the actual reorganization; that appellant was the only employee who lost a job due to the reorganization; and that at the same time the employer laid the appellant off for budget reasons, it reclassified several other employees resulting in an overall budget increase. The Board also adopted the "but for" standard for evaluating mixed motive cases under SPRL, finding that the State would not have removed the appellant "but for" the discipline. The Board noted that since the State made no attempt to prove that it had cause to remove the employee for disciplinary reasons, it would not address this issue and ordered the appellant reinstated. Fery v. Department of Administrative Services, Information Resource Management Division, General Government Data Center, Case No. MA-31-02, Member Kasameyer dissenting (October 2005), Ruling on Motion to Stay (March 2006), recons (March 2007).

16.15 5 In a petition for review of an arbitrator's award, the Board denied the State's motion to stay the arbitrator's reimbursement remedy pending the outcome of its petition for review. The Board held that it does not have statutory authority under ORS 240.086(2) to enjoin enforcement of arbitration awards. Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA) v. SEIU, Local 503, Case No. AR-1-05, 21 PECBR 307 (April 2006).

16.15 6 A classified employee, who had recently become represented by SEIU, appealed his dismissal under SPRL because SEIU and the State had agreed to a grievance procedure which took effect 5 days after his termination. The Board dismissed the appeal for lack of jurisdiction, stating that under ORS 240.086(1) it only has authority to review "any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit." The Board noted that in *Oregon AFSCME Council 75, AFL-CIO, and Tender v. State of Oregon, Department of Environmental Quality*, Case No. UP-131-86, 10 PECBR 287 (1987), it had found that the State violated ORS 243.672(1)(e) because the State changed the *status quo* established by the SPRL when it dismissed an employee in similar circumstances to the appellant. Manion v. Department of Fish and Wildlife, Case No. MA-26-03 (June 2004), AWOP, 201 Or App 589, 121 P3d 23 (2005).

16.15 7 The State requested reconsideration of the Board's decision that the appellant was not an executive service employee, asserting that the Board had relied on an argument not raised by the parties and, as a result, the State had no notice it needed to present evidence related to that argument. In the alternative, the State sought to reopen the record to present additional evidence. The Board adhered to its prior order. The Board first ruled that the State, the appellant, and the ALJ's statement of the issue had all raised the issue of whether appellant was an executive service employee under ORS 240.205(4). The Board also stated that even if the issue had not been raised, once the meaning of ORS 240.205(4) was placed at issue, the Board was entitled to interpret the statute based on arguments not raised by the parties. The Board cited *Newport Church of the Nazarene v Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002), in which the court held that where the construction of a statute is at issue, its meaning is for the courts to decide, and they can do so based on arguments not raised by the parties. The Board also declined to reopen the record based on "[c]onsiderations of finality, stability and efficient use of our scarce resources" because the State had not shown good cause why the proffered evidence was not available at the time of the hearing. Member Kasameyer, in a concurring opinion, would have permitted the State to present jurisdictional evidence on remand. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

16.15 8 Appellant filed an appeal over removal from management service. The State asserted that the Board lacked jurisdiction because the appellant was an executive service employee. ORS 240.205 provides that an executive service employee must be either a "deputy" or a "principal assistant." The Board held that the appellant was not a "deputy" because she did not report directly to any listed executive or administrative officers, did not exercise the officer's authority when the officer was absent, and the organizational chart placed appellant at least one step below the level of deputy because she reported to a deputy assistant director. The Board also determined that the State had failed to prove that the appellant was a "principal assistant" because there was no evidence that the employee had been approved as a principal assistant by the DAS director as specifically required under the statute and it could not speculate that the DAS director has given approval because the Board's review is confined to the factual record. Citing to ORS 174.101 and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), the Board stated that when construing a statute, it may not omit language that the legislature has included. The Board then considered whether appellant fell within management service. Under ORS 240.212, management service comprises all positions that are neither unclassified nor exempt, and that are either confidential, supervisory, or managerial as defined in ORS 243.650. The Board held that because appellant directly and indirectly supervised over 200 employees; planned, assigned, and approved work;

responded to grievances; disciplined and rewarded employees; hired and fired; and prepared and signed performance appraisals, her duties clearly qualified her as a supervisory employee under ORS 243.650(23), and therefore a member of the management service. Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005).

16.15 9 After the Board set aside appellant's demotion within management service, the State filed a motion for reconsideration of the Board's order reinstating appellant to the position from which he had been demoted asserting that the position had been abolished and a new position established. The State offered to relocate the appellant to a position in Klamath Falls. The Board declined to consider factual evidence submitted with the motion because it was not part of the original record. The Board also declined to take official notice of policies submitted with the motion because it would require that the record be reopened for further evidence regarding the meaning and application of the policies. The Board held that the legislature's use of the term "the position" in ORS 240.560(4), indicated an intent to refer back to the position from which the employee was demoted and that the common meaning of the statutory terms "reinstatement" and "reemployment" in that statute demonstrated that the statute is referring to "the position" appellant previously held. The Board also held that the State failed to present any evidence that the position was abolished through a legitimate reorganization rather than reclassified, and failed to meet its burden of proving that the reclassification was legitimate and not taken to prevent the Board from ordering the appellant's reinstatement. Bellish v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-23-03 (April 2004), recons (June 2004).

16.15 10 Governmental auditor appealed his removal from trial service. The Board stated that Appellant had the burden of proving that the removal was unlawful but noted that the State had agreed to present its case first. At hearing, Appellant offered evidence to support his assertion that he was diagnosed with attention deficit disorder (ADD) and was entitled to accommodation under the Americans with Disabilities Act (ADA). The State objected to the evidence, arguing that the Board does not have jurisdiction over ADA issues. The Board ruled that the ALJ had not erred in excluding Appellant's proffered evidence. Based on the record, the Board first concluded that Appellant had not proven that his termination violated ORS 240.410 and there was a rational basis to support the State's decision. The Board also ruled that it did not have jurisdiction to consider Appellant's argument that, in essence, his performance would have been satisfactory had the State provided a reasonable accommodation under the ADA: "In order for this Board to reach that conclusion, we would have to decide that Appellant does indeed have an ADA-qualifying condition, that he properly made the State aware of the condition, that he requested reasonable accommodation under the ADA, and that the State refused to provide reasonable accommodation. We are not authorized by SPRL to make such determinations. Such matters are within the express authority of other federal and State agencies. *See, for example,* ORS 659A.112 and 659A.800, et seq." McCoy v. Transportation Department, Case No. MA-8-02 (January 2003).

16.15 11 Natural resource specialist 1, in the classified service, was terminated and appealed, alleging violation of ORS 240.555 and 240.560. The State, asserting the Public Records Law, moved to seal portions of the record involving testimony about discipline imposed on another State employee. After reviewing precedents, the Board ruled that the ALJ had acted within his discretion in entering a protective order; the Board quoted that order in its decision. Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002).

16.15 12 Transportation Department's decisions regarding the appointment of personnel to a new program (which the legislature transferred from PUC to DOT) were not subject to "administrative or judicial review," under the terms of Senate Bill 1149 (1995 Or Laws ch. 733, sec. 1(4)). The Board ruled that, because that specific statute controlled the more general terms of the SPRL, the Board had no jurisdiction to review Appellants' claims that the Department's decision not to hire them violated the SPRL. Member Whalen dissented, arguing that SB 1149's "prohibition of administrative and judicial review is unconstitutional as applied to Appellants." Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998).

16.16 Duty of good faith and fair dealing (classification new in 2001; includes only cases after that date)

16.16 1 A grievance settlement estopped individuals from litigating their ORS 240.309 complaint that they were unlawfully hired as *temporary* employees but assigned to work as *seasonal* employees, the Board held. The Board found that the State employed Complainants as seasonal employees, represented by SEIU in a bargaining unit, until the end of September 1999; the State later hired three other individuals as temporary employees; Complainants filed a grievance alleging that the State's hiring of the other individuals violated the State-SEIU collective bargaining agreement; the State and SEIU settled the grievance with an agreement that stated that it was to "fully resolve any and all issues surrounding the" grievance and that the parties did not agree with each other's interpretation of the collective bargaining agreement; consistent with the settlement, the State offered Complainants post-season work as *temporary* employees; Complainants completed that work between November 2000 and February 2001; the post-season work was the same type as the seasonal work; and seasonal employees are entitled to certain rights and benefits not provided to temporary employees. Citing *Paulson v. Western Life Insurance Co.*, the Board stated that the elements of equitable estoppel are that the evidence establish "that (1) a false representation (albeit an innocent one) was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon [by the other party] and (5) that [the other party] acted upon it. The Board concluded that: (a) SEIU made a false representation to the State when it agreed that the settlement fully resolved "any and all issues" concerning the grievance; (b) SEIU knew the facts; © the State reasonably believed that the subject ORS 240.309 dispute was resolved by the settlement agreement; (d) SEIU intended for the State to offer post-season work to Complainants; and (e) the State did hire Complainants for that work, as temporary employees. The Board stated: "It offends equitable principles for Complainants to bargain a grievance settlement, accept the benefits of that settlement, and then initiate litigation to seek additional benefits that they failed to obtain in bargaining. The complaint is barred by estoppel and will be dismissed." In footnote 6, the Board stated that Complainants' conduct "likely violates the duty of good faith and fair dealing as well." Frost, Brown, and Hazelton v. Parks and Recreation Department, Case Nos. MA-13-00 & MA-3-01 (June 2002), AWOP 192 Or App 602, 89 P3d 95 (2004).

Chapter 17—Review/Enforcement of State Employee Arbitration Awards

17.1 Party entitled to challenge award

17.1 1 ORS 240.086 does not grant the Board jurisdiction to review interest arbitration awards rendered under ORS 243.742-.752, the Board ruled. The Board stated that "[t]he proper mechanism for review of [interest arbitration] awards is through the [Public Employee Collective Bargaining Act], specifically ORS 243.752 and ORS 243.672(1)(f)." State Police Department and Administrative Services Department v. OSPOA, Case No. AR-3-00/UP-30-00, 18 PECBR 771 (October 2000).

17.2 Timeliness

17.2 1 The Board dismissed union's petition for enforcement of an arbitration award, holding that under OAR 115-50-001(2) a petition for enforcement may not be filed when a petition for review is pending. The Board then dismissed the petition for review. Mental Health and Developmental Disability Services Division v. Oregon Public Employees Union, Local 503, Case No. AR-1-94 (October 1994).

17.3 Pleading requirements

17.3 1 The Board dismissed a petition for review challenging an arbitration award which set aside 21 downward position reclassifications on the basis that they were arbitrary and violated the collective bargaining agreement. At the same time, the Board dismissed the union's petition for enforcement, holding that under OAR 115-50-001(2) a petition for enforcement may not be filed when a petition for review is pending. Mental Health and Developmental Disability Services Division v. Oregon Public Employees Union, Local 503, Case No. AR-1-94 (October 1994).

17.3 2 The Board dismissed a petition alleging that an arbitrator had "imperfectly executed" his powers so that a final award had not been made on the grievance submitted to him. The Board noted that Appellant had not complied with Board rules in filing the petition because the petition was not accompanied by a copy of the arbitration award. However, the Board found that Appellant had made a good faith effort to comply with the rule and that the failure to comply did not prejudice the agency. The Board dismissed the appeal on the merits. Richey v. State of Oregon, Corrections Division, Case No. A-1466 (June 1984).

17.4 Scope of review

17.4 1 *ORS 240.086(2)(g): claim that award "is in violation of law."* SEIU sought review of an arbitrator's decision arguing that the arbitrator got the facts and law wrong and that the award violated the law because it permitted the State to discipline an employee for union activity protected under ORS 243.672(1)(a).The Board first reviewed its precedents regarding the standards for review of arbitration awards under ORS 240.086, noting that these are the same standards that the Board applies in reviewing arbitration awards under ORS 243.672(1)(g) and (2)(d). The Board granted the State's motion to disregard the reference to an exhibit in the Union's brief because the Union is not entitled to challenge the arbitrator's factual findings under ORS 240.086(2). The Board stated that since it does not engage in a "right/wrong analysis" of the award, it does not determine if the

arbitrator got the facts or the law wrong or examine the arbitrator's reasoning. The Board's role in reviewing an arbitration award under ORS 240.086(2)(g) is limited to looking at the result of the award and determining whether it orders the State "to commit an unlawful act or refrain from an act that is required by law." Under this standard, the Board held that it was aware of no law that prohibited "an employer from disciplining an employee who verbally abused a manager, when the employee was not engaged in protected union activity." Petition dismissed. Department of Transportation v. SEIU, Local 503, Case No. AR-1-06, 21 PECBR 838 (May 2007).

17.4 2 *ORS 240.086(2)(g): claim that award "is in violation of law."* The Board first clarified what was subject to review under ORS 240.086(2)(g), quoting from *Federation of Oregon Parole Officers v. Corrections Division*, 67 Or App 559, 562-63, 679 P2d 868, *rev den*, 297 Or 458 (1984), which provided that the "phrase '[t]he *award* is in violation of law' (emphasis supplied), read literally, refers to the legality of the end-product of the arbitration and not to the legal reasoning underlying the arbitrator's decision* * *." The Board also stated that it does not determine the accuracy of the arbitrator's findings of fact and does not conduct "a right/wrong analysis" of the award citing *Service Employees International Union, Local 503, v. Office of Services for Children and Families*, Case Nos. AR-3/4-03, 20 PECBR 829 (2005), but that the award must comply with ORS 243.706(1). The Board held that since the arbitrator found that the grievant's startle reflex was involuntary, which is a finding not subject to Board review, the award did not violate ORS 243.706(1) because an involuntary act is not misconduct within the meaning of that statute. The Board also held that the award did not require the employer to violate ORS 654.010 or ORS 163.160 because those statutes do not require an employer to discipline an employee for involuntary conduct and if the conduct effected other employees, other means were available to remove the risk. In addition, the Board found that there was not a basis to conclude that the arbitrator exceeded her authority when she "strongly urged" the State to allow the grievant to work from home. Petition dismissed. Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA) v. SEIU, Local 503, Case No. AR-1-05, 21 PECBR 307 (April 2006).

17.4 3 *ORS 240.086(2)(d): claim the arbitrator "exceeded their powers."* The State, which is required under ORS 419B.030 to maintain a registry of child-abuse investigations, challenged the portion of the arbitrator's reinstatement remedy which required the State to change or delete reports in the registry related to the grievant. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting *Woodburn Education Association v. Woodburn School District*, Case No. C-126-83, 7 PECBR 6509, 6527 (1984), the Board stated that "[a]n arbitrator 'is empowered to grant any relief reasonably fitting and necessary to remedy a *contract violation*.'" The Board concluded that "[b]ecause the order to purge the registry is not grounded in the contract, it is a remedy beyond the Arbitrator's authority." The Board deleted the portion of the award that required the State to purge the records and modified the award to prohibit the State from using the registry contents in any way that impacted the grievant's employment. Office of Services for Children and Families v. SEIU Local 503, AR-3/4-03, 20 PECBR 829 (February 2005).

17.4 4 *ORS 240.086(2)(g): claim that "award is in violation of law."* The State, which is required under ORS 419B.030 to maintain a registry of child-abuse investigations, challenged the portion of the arbitrator's reinstatement remedy which required the State to change or delete reports in the registry related to the grievant. The Board reviewed its precedents regarding its limited authority to

review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting *Astoria Education Association v. Astoria School District 1*, Case No. UP-42-96, 16 PECBR 813, 821, 823 (1996), AWOP, 149 Or App 212, 942 P2d 302, 303 (1997), the Board stated that "we will refuse to enforce an award that requires the commission of an unlawful act." The Board noted that the arbitrator had used the standard of "clear and convincing" evidence in reaching her decision, but the statute only required a "reasonable suspicion" for including reports in the registry. The Board concluded that "[t]he Arbitrator's award is contrary to law insofar as it attempts to impose a standard that is higher than the one prescribed by statute for placing material in the registry." The Board deleted the portion of the award that required the State to purge the records and modified the award to prohibit the State from using the registry contents in any way that impacted the grievant's employment. Office of Services for Children and Families v. SEIU Local 503, AR-3/4-03, 20 PECBR 829 (February 2005)

17.4 5 *ORS 240.086(2)(f): claim that arbitrator "awarded upon a matter not submitted to them."* SEIU challenged an arbitrator's award reinstating an employee, but without back pay based on the employee's failure to cooperate with the employer's investigation. The union asserted that since the employee had not been dismissed for failure to participate in the investigation, the arbitrator had based her award on a matter not submitted to her. The Board reviewed its precedents regarding its limited authority to review arbitration awards. The Board stated that this principle also applies to remedies, but clarified that an arbitrator's remedial authority is not unlimited. Quoting from *Department of Corrections v. AFSCME Council 75*, Case No. AR-1-92, 13 PECBR 846, 868 (1992), the Board stated that an arbitrator has substantial discretion in determining the remedy as long as it is "tailored to the violation and grounded in the contract." The Board found that the union had failed to show a violation of ORS 240.086(2)(f) because the contract gave the arbitrator broad authority to fashion a remedy, the remedy was based on the arbitration record, and the arbitrator had explained the remedy. Petition dismissed. SEIU, Local 503 v. Office of Services for Children and Families, AR-3/4-03, 20 PECBR 829 (February 2005).

17.4 6 The Court of Appeals dismissed the appeal of a Board decision as moot and vacated the Board's order. The Board had ruled that an arbitrator's "interim award" (a procedural ruling) is not subject to the Board's discretionary review, under ORS 240.086(2). The Board found that a state police officer engaged in certain conduct; the State terminated the officer; prosecutors filed criminal charges against him in circuit court; the judge dismissed two of the charges; and the district attorney appealed to the court of appeals. The Association processed a grievance to arbitration and requested the arbitrator to postpone the hearing, to preserve the officer's Fifth Amendment rights, pending resolution of the criminal case; the State opposed that motion. The arbitrator convened a hearing and heard all offered testimony, except that from the officer. After the officer agreed to two conditions for a stay of the hearing (terms regarding back pay and reinstatement), the arbitrator adjourned the hearing, with certain provisos. In its discussion, first, the Board rejected the Association's argument that the Board has jurisdiction to review only "final" awards, concluding that it has the authority to review nonfinal awards but deciding to "exercise our discretion to decline to review interim rulings or awards, except in rare or unusual circumstances not present in this case." Second, the Board rejected the State's contention that the arbitrator exceeded his authority by ordering a stay that would result in a potentially-long delay that, the State asserted, would make the arbitrator unable to render a valid award: "Given the existence of a record in the arbitration hearing, we reject this State argument." Third, the Board stated that the arbitrator "narrowly and rationally limited the duration of the adjournment * * * [and] imposed conditions to minimize potential harm to the State resulting

from the delay." As a result, the Board concluded that the circumstances did not warrant an assertion of jurisdiction and review of the arbitrator's interim ruling. (In footnote 2, the Board also noted that ORS 243.706(3)(c) of the PECBA provides that an arbitrator may adjourn hearings "from day to day, or for a longer time * * *.") State Police Department and Department of Administrative Services v. OSPOA, Case No. AR-2-00 (July 2000), 18 PECBR 711, recons (November 2000), *appeal dismissed as moot and Board order vacated* (December 2002).

17.4 7 *ORS 240.086(2)(d): claim that arbitrator "exceed[ed] authority."* Quoting a PECBA decision, *Willamina Education Association v. Willamina School District*, Case No. C-253-79, 5 PECBR 4086, 4100 (1980), the Board stated that it does not conduct a "right/wrong" review of arbitration awards. The parties submitted a promotion selection dispute to an arbitrator; stipulated that the issue was whether the State had violated particular provisions of the collective bargaining agreement; and the arbitrator decided that the State had violated a provision. The Board concluded that the State's argument that the arbitrator exceeded her authority "by defining how the State is to conduct its selection process is an invitation to conduct a right/wrong review of the arbitrator's reasoning. We decline to do so." (Order at 10-11.) Petition dismissed. Transportation Department and Motor Vehicles Department v. OPEU, Case No. AR-1-98, 17 PECBR 814 (November 1998).

17.4 8 *ORS 240.086(2)(e): claim of "evident material mistake."* The Board stated that a State challenge to an arbitration award "relates not to the arbitrator's *description* of a person, thing, or property, but rather to the arbitrator's *interpretation* of a contract provision. In essence, the State's complaint is nothing more than an argument that the arbitrator incorrectly interpreted the State's contractual obligations." (Order at 11.) The Board stated that its standard of review prohibit such inquiries and held that the award was not unenforceable under section (2)(e). Petition dismissed. Transportation Department and Motor Vehicles Department v. OPEU, Case No. AR-1-98, 17 PECBR 814 (November 1998).

17.4 9 *ORS 240.086(2)(d): claim that award was rendered "upon a matter not submitted" to arbitration.* The Board found that the parties expressly asked the arbitrator—if the arbitrator concluded that the employer violated the contract—to determine appropriate remedy. The arbitrator did find a violation and ordered the State to repeat an employee promotion selection process. The Board rejected the State's argument that the award violated ORS 240.086(2)(d), stating that the remedy awarded "was related to the violation and grounded in the contract." (Order at 13.) Petition dismissed. Transportation Department and Motor Vehicles Department v. OPEU, Case No. AR-1-98, 17 PECBR 814 (November 1998).

17.4 10 The Board dismissed a petition for review of an arbitration award which set aside 21 downward position reclassifications on the basis that they were arbitrary and violated the collective bargaining agreement. The Board held, citing *FOPPO v. Corrections Division*, 67 Or App 559, rev den 297 Or 458 (1984), that the test for such challenges is whether the arbitration award would require the violation of a law. The Board found that the award, which required the employer to restore grievants to previously held job classifications, did not require the employer to violate ORS 240.215. The Board concluded that there was no conflict between the State's authority to make position allocations under ORS 240.215(2) and the terms of the collective bargaining agreement because the negotiated contract established the conditions under which the classifications were to be made and changed in accordance with the law. Mental Health and Developmental Disability Services Division v. Oregon Public Employees Union, Local 503, Case No. AR-1-94 (October 1994).

17.4 11 The Board dismissed a petition for review of an arbitrator's award which held the agency had violated the collective bargaining agreement by failing to post a bargaining unit position before placing a management service employee, whose position had been abolished, in the job. The agency claimed that the arbitrator exceeded her powers and that the award violated ORS 240.570(1). After reviewing the legislative history of ORS 240.570(1), the Board concluded that it was within the arbitrator's power to decide that the agency had contractually limited its ability to return management service employees to bargaining unit positions. The Board also held that the award did not violate ORS 240.570(1), as amended, which specifies that a management service employee "may be returned" to a position held prior to the management service appointment. Real Estate Agency v. Oregon AFSCME, Local 3581, Case No. AR-2-93 (April 1994).

17.4 12 The Board partially vacated an arbitrator's award on the grounds that it exceeded his authority and that the remedy ordered was not on a matter submitted to him by the parties. The arbitrator found that the state did not have just cause to reprimand a state police officer for arguing with his lieutenant about changes the lieutenant had made in the officer's evaluation. As a remedy, the arbitrator ordered that the lieutenant's version of the officer's evaluation be rescinded, that the officer's version of the evaluation be restored, and that the officer receive a pay-step increase, as the arbitrator considered appropriate given the change in the evaluation. The Board found that the arbitrator had exceeded his authority by ordering more than restoration of the grievant to his position prior to the discipline. The Board noted that absent the improper reprimand, the officer would still have had the lieutenant's version of the evaluation in his file and would not have received a pay increase. The Board concluded that the arbitrator decided a matter which was not before him—the officer's evaluation and placement on the salary scale, which were the subject of a pending grievance—and that the grievant could have been fully restored simply by having the reprimand removed from his file. The Board vacated the award to the extent it went beyond rescinding the letter of reprimand. Oregon State Police v. Oregon State Police Officers' Association, Case No. AR-1-93 (June 1993).

17.4 13 The Board dismissed the agency's petition for review of an arbitration award. The agency claimed that the award was in violation of law, that it exceeded the terms of the grievance, and that the arbitrator exceeded his authority by ignoring the plain meaning of the contract. The Board rejected the agency's argument that the Board should engage in a "right/wrong" review of arbitration awards under ORS 240.086, and indicated that it would apply the limited review standard of *Willamina Education Association and Luciano v. Willamina School District*, Case No. C-253-79, 5 PECBR 4086 (1980) (*Willamina II*). Under *Willamina II*, the Board will enforce an arbitration award unless it is established either that (1) the parties did not agree to accept such an award as final and binding or (2) enforcement of the award would be contrary to public policy. The Board concluded that the arbitrator's failure to offset workers' compensation benefits in ordering back pay for the grievant did not make the award violate the law because the decision on offsetting benefits was within the arbitrator's discretion. The Board held that the arbitrator's remedy was tailored to the contract violation and thus did not exceed the terms of the grievance. Finally, the Board held that the arbitrator's remedy did not exceed his authority. Department of Corrections v. AFSCME Council 75, Local 2623, Case No. AR-1-92 (September 1992), appeal withdrawn (March 1993).

17.4 14 The Board dismissed a petition alleging that an arbitrator had "imperfectly executed" his powers so that a final award had not been made on the grievance submitted to him. The Board found nothing in the award to support the allegation, concluding that the arbitrator had provided the

grievant with a make whole remedy. The Board refused to inquire into the reasoning of the arbitrator and found that the parties had agreed in their collective bargaining agreement that the award would be final and binding. Richey v. State of Oregon, Corrections Division, Case No. A-1466 (June 1984).

Chapter 18—Temporary Employment

(Chapter new in 1996; includes only cases after that date.)

18.1 Timeliness of appeal

18.1 1 Temporary employee—employed in a temporary position from September 14, 1999 to July 21, 2000—filed a complaint on August 1, 2000, alleging that his temporary employment exceeded six months, in violation of ORS 240.309. The State asserted that the complaint was untimely under Board Rule 115-45-017(2), which provided: "The complaint must be filed with the Board no later than 30 days after the employee knew or should have known of the action being appealed." After reviewing the rule in the context of ORS 240.307 and *Huff v. Great Western Seed Co.*, 322 Or 457, 461 n. 3 (1996), the Board concluded that the rule was invalid. In addition, the Board stated that "[b]ecause ORS 240.307 does not contain a discovery rule ["knew or should have known of the action"], it was improper for this Board to enact a rule that included one. Where we find that an administrative rule is not in accordance with the statute, we are obliged to defer to the statute." Accordingly, the Board did not apply the rule and used the approach from *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000): the 30-day time period for a complaint alleging a violation of ORS 240.309 begins on the temporary employee's termination date. Under that approach, the Board ruled that Complainant's appeal was timely. Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

18.1 2 "The 30-day filing period for a temporary employee to submit a complaint to this Board typically begins on the employee's termination date," not the date on which the employee attains six months of employment, the Board ruled. The Board noted that, in most cases, it is not until the termination date "that a temporary employee would know that a claim [for violation of ORS 240.309] might exist." (Order at 4.) The Board upheld the ALJ's denial of the State's motion to dismiss the appeal as untimely. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.1 3 Appellant's motion to amend her complaint, at hearing, was properly denied by the ALJ as untimely, the Board ruled. EOTC employed Appellant from March 3 through December 31, 1997 and again from May 5 to July 2, 1998. At the December 8 , 1988 hearing regarding her complaint about her employment during the *first* period, she moved to amend her complaint to allege that the State had also violated her rights during the *second* period. In ruling that the amendment was untimely, the Board noted that Appellant had submitted her motion more than 30 days after the July 2, 1998 termination of her *second* period of employment. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.1 4 Where Complainant did not present evidence that three particular individuals were employed as temporary employees during the 30 days prior to the filing of the ORS 240.307 complaint, the Board dismissed the complaint as to those individuals. Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.1 5 Temporary employee's employment ended December 30, 1996. In an appeal filed February 28, 1997, she alleged that the termination was unfair. Board Rule 115-45-017 provided, at that time, that appeals claiming a violation of the temporary employment statute, ORS 240.309, must be filed "no later than 30 days after the employee knew or should have known of the action being appealed." The Board dismissed Appellant's appeal as untimely, observing that, to be timely, it should have been filed no later than January 29, 1997. (The Board also observed that a conflict existed between temporary employee appeal rules adopted by the Board and by DAS, but the Board noted that the conflict did not affect Appellant's appeal.) Cole v. Department of Administrative Services, Case No. MA-3-97 (March 1997).

18.2 Rulings generally

18.2 1 A grievance settlement estopped individuals from litigating their ORS 240.309 complaint that they were unlawfully hired as *temporary* employees but assigned to work as *seasonal* employees, the Board held. The Board found that the State employed Complainants as seasonal employees, represented by SEIU in a bargaining unit, until the end of September 1999; the State later hired three other individuals as temporary employees; Complainants filed a grievance alleging that the State's hiring of the other individuals violated the State-SEIU collective bargaining agreement; the State and SEIU settled the grievance with an agreement that stated that it was to "fully resolve any and all issues surrounding the" grievance and that the parties did not agree with each other's interpretation of the collective bargaining agreement; consistent with the settlement, the State offered Complainants post-season work as *temporary* employees; Complainants completed that work between November 2000 and February 2001; the post-season work was the same type as the seasonal work; and seasonal employees are entitled to certain rights and benefits not provided to temporary employees. Citing *Paulson v. Western Life Insurance Co.*, the Board stated that the elements of equitable estoppel are that the evidence establish "that (1) a false representation (albeit an innocent one) was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon [by the other party] and (5) that [the other party] acted upon it. The Board concluded that: (a) SEIU made a false representation to the State when it agreed that the settlement fully resolved "any and all issues" concerning the grievance; (b) SEIU knew the facts; © the State reasonably believed that the subject ORS 240.309 dispute was resolved by the settlement agreement; (d) SEIU intended for the State to offer post-season work to Complainants; and (e) the State did hire Complainants for that work, as temporary employees. The Board stated: "It offends equitable principles for Complainants to bargain a grievance settlement, accept the benefits of that settlement, and then initiate litigation to seek additional benefits that they failed to obtain in bargaining. The complaint is barred by estoppel and will be dismissed." In footnote 6, the Board stated that Complainants' conduct "likely violates the duty of good faith and fair dealing as well." Frost, Brown, and Hazelton v. Parks and Recreation Department, Case Nos. MA-13-00 & MA-3-01 (June 2002), AWOP 192 Or App 602, 89 P3d 95 (2004).

18.2 2 Testimony about the meaning of the temporary employment statute, ORS 240.309, from former legislators and a former union political director was properly excluded by the ALJ, the Board ruled. The Board stated: "If a statute is not clear on its face, the best evidence of legislative history is the legislative record: recorded testimony, various reports, and meeting minutes. After-the-fact testimony from legislators or legislative witnesses about what they meant by certain legislation is not useful in determining the intent of the legislature as a whole." Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002). See also Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002).

18.2 3 Appellant was entitled to be represented by OPEU, the Board ruled, because ORS 240.307 provides that "any employee" can file an appeal and does not prohibit an employee from being represented by a labor organization in a hearing. The Board upheld the ALJ's denial of the State's motion to prohibit OPEU from representing Appellant. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 4 Temporary employee's resignation during a *second* period of temporary employment did not render moot her claims that the State's conduct during her *first* period of temporary employment violated ORS 240.309, the Board ruled. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 5 The State has a duty to provide information to a temporary employment appellant, under OAR 115-10-055(1), the Board ruled. The Board stated that the ALJ correctly ruled that EOTC had "an obligation to *provide*, but not to *analyze*, the information [Appellant] requested, provided that the information produced was readily understandable." (Order at 5.) Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 6 *Audiotapes*. The Board stated that it generally will not receive audiotapes as evidence. Instead, it stated that it "will accept as an exhibit a transcript of an excerpt of a tape, provided that: (a) the transcriptionist signs a notarized statement that the document is a verbatim transcript of the identified tape, and (b) the party provides the opposing party with a copy of the transcript and the full tape from which it was derived sufficiently before the hearing to give the opposing party an opportunity to review the tape and transcript. A reasonable time for such disclosure generally is no less than 14 days before hearing." (Order at 5.) Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 7 *Individual who is not a temporary employee has standing to file an ORS 240.307 complaint*. The Board stated: "ORS 240.307 does not require that a person filing a complaint be an injured party or that they be a temporary employee, only that they be an employee." (Order at 3.) Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 8 *ORS 240.307 Complainant can be represented in the litigation by a labor organization.* The Board stated: "[W]hile OPEU has no independent right to prosecute alleged violations of ORS 240.309, neither ORS 240.307 nor any other statute prohibits OPEU from serving as 'counsel' to an employee pursuing a temporary employment complaint." (Order at 3.) Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 9 *Prima facie case.* The Board stated, in footnote 5: "A 'prima facie' case is defined as: 'Such as will prevail until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to [the] contrary is disregarded.'" (Order at 6.) *Black's Law Dictionary* (West abridged sixth edition 1991). To establish a prima facie violation of ORS 240.309, a complainant must prove certain facts, depending upon the section of the statute allegedly violated, to establish that the agency's employment of specific individuals did not comply with one or more elements of the law. Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.2 10 Permanent painters filed complaints alleging that the State had unlawfully hired temporary painters, in violation of ORS 240.309, which had the effect of depriving them of eight months of employment. In discussing the background of the dispute, the Board stated that Fairview had hired two temporary painters to assist its four permanent painters in preparing the facility for a scheduled closure. The Board also stated that the temporary painters worked less than six months; were not hired to fill in for an employee on leave; were hired for a short-term workload need; and there was no vacancy for a permanent employee. The Board dismissed the complaints for failure to state causes of action under the SPRL for which relief could be granted. Clark and Hunt v. Fairview Training Center, Case Nos. MA-4/5-99 (May 1999).

18.3 Cases

18.3 1 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. Carmoney v. Employment Department, Case No. MA-9-03 (April 2003).

18.3 2 Temporary employee, who was employed in a temporary position for over ten months, filed a complaint alleging that his temporary employment exceeded six months, in violation of ORS 240.309. Following an analysis used in *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000), the Board determined that the State did not employ Complainant either for an emergency or to replace an employee on leave and concluded that the State employed him for longer that six months, contrary to ORS 240.309. To remedy the violation, the Board reviewed the legislative history of the statute and ordered the State to pay Complainant the difference between his temporary employee pay and the pay and benefits he would have earned if employed as a regular employee, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. In addition, the Board ordered the State to cease and desist from employing temporary personnel in violation of the law. In its supplemental order, the Board ordered the State to reimburse Complainant for his actual medical and dental costs incurred as a result of not receiving such through insurance as a regular employee, including premium payments and out-of-pocket costs, beginning with the day after he completed six

months of service as a temporary employee and ending with his termination. Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

18.3 3 The State conceded that its employment of Appellant, a temporary employee, for more than six months violated ORS 240.309 and agreed that the sole issue was the appropriate remedy. The Board stated that the remedy is a penalty calculated as "the difference between (1) what the temporary employee earned and accrued beginning six months after his initial hire until his termination, and (2) what that same employee would have earned or accrued had the State complied with the statute" and treated Complainant as a regular employee. The Board ordered the State to pay Complainant cost-of-living and step increases, holiday pay, medical and dental benefits, vacation leave, and sick leave; in addition, it ordered the State to cease and desist from employing temporary personnel in violation of the law. Complainant argued that he was also entitled to rights of regular employees under the terms of the State-OPEU collective bargaining agreement, including recall rights. The Board determined that he had failed to establish, on the record, what those rights were and therefore did not address that issue. In a supplemental order, the Board clarified that the State was to reimburse Complainant for his actual medical and dental costs incurred as a result of not receiving such through insurance as a regular employee, including premium payments and out-of-pocket costs, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002).

18.3 4 EOTC employed Complainant as a temporary employee in violation of ORS 240.309, the Board held. The Board stated that the statute permits the State to hire temporary employees for three reasons: *emergency*, *nonrecurring*, or *short-term* workload needs. The Board also discussed the terms of ORS 240.309(3) (replacing "an employee during an approved leave"), ORS 240.309(4) (exceptions to the "same" workload requirement), and ORS 240.309(5) (the "different" workload requirement). The Board rejected the State's argument that the statute allows the employment of a temporary employee for an indefinite amount of time, where the temporary is replacing permanent employees on approved leaves. The Board summarized that the State is allowed to employ a temporary employee for more than six months only in an *emergency*, where no other reasonable alternative exists, and when *an* employee is on an approved leave. The Board stated that EOTC asserted that it employed Complainant as a temporary employee for three reasons: as an "emergency" measure to assure that the institution was fully staffed during an audit by a federal funding agency (that agency requires full staffing as a condition of continued funding); to serve in a pool of temporary employees who replaced permanent employees on approved leaves; and to cover for an employee who was on an extended medical leave. First, the Board determined that the asserted "emergency" employment was not in fact an emergency, because the federal agency's audit is an annual event: "To consider the [audit] as creating an emergency workload need would mean that EOTC is essentially in a perpetual state of emergency." (Order at 14.) (The Board stated that *Trotts v. OSH*, Case No. MA-9-95 (October 1995) was distinguishable and that it did not accept the notion that "a *chronic* staffing shortage constitutes an emergency workload need, within the meaning of ORS 240.309."(Order at 15.)) Second, the Board stated that "[t]o conclude that EOTC's use of Fairbank in the temporary pool as a day-do-day substitute for absent employees did not count toward her six-month maximum employment period would make a mockery of the concept of 'temporary' employment." (Order at 15.) Third, the Board concluded that EOTC unlawfully employed Fairbank as a temporary employee for more than six months during a twelve-month period. To determine the amount of Fairbank's "loss of wages, benefits and rights," under ORS 240.307(4)(a), the Board

ordered Fairbank and EOTC to meet and confer regarding an appropriate make-whole remedy. The Board specified that the parties, if unable to reach agreement, were to submit proposed remedies to the Board, which would then adopt the proposed remedy that best effectuated the purposes of the law. The Board also ordered EOTC to discontinue employing temporary employees in excess of six months, unless in compliance with the statute. In addition, the Board observed that the statute does not allow, as a remedy for a violation, the conversion of a temporary employee to permanent status. In a concurrence, Chairman Stiteler argued that *Trotts* should be overruled. In its supplemental order regarding the parties' unresolved remedial issues, the Board ordered that the appropriate date for the temporary employees to begin receiving certain benefits (apparently those provided to regular employees) was the day after she was employed more than six months, not the point at which she had worked 1040 hours. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.3 5 *Fairbank v. EOTC dissent*. In a dissent to the majority ruling (see above entry), Member Thomas argued that the complaint was not timely; asserted that Fairbank's union representative, not Fairbank, was the Complainant; stated that the filing of the complaint was flawed; reviewed the legislative history of the temporary employee statutes; concluded that the State did not violate the statute in using Fairbank as a temporary substitute employee; and contended that the only appropriate remedy was a cease and desist order. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.3 6 *Summary of conclusion in Fairbank v. EOTC, Case No. MA-3-98 (June 2000)*: ORS 240.309 permits a State agency to employ temporary employees "for three purposes: emergency workload needs; nonrecurring workload needs; and short-term workload needs. * * * [A] State agency may employ a temporary employee for more than six months in only two circumstances: to meet continuing emergency needs, and to fill in behind an employee on an approved leave." (Order at 6.) Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.3 7 The State employed temporary employees contrary to ORS 240.309, the Board held, where EOTC assigned them to both specific jobs and to a temporary employee pool; they were not hired to meet particular emergency needs; and they were not hired to replace particular employees on approved leaves. The Board rejected EOTC's claim that an emergency existed that justified using temporary employees more than six months, stating that the agency's "understaffing has existed for at least several years and apparently is continually recurring. A chronic condition, no matter how dire, can hardly be considered an emergency." (Order at 7.) The Board also rejected EOTC's argument that employment of temporary employees was authorized by the "leave" exception in ORS 240.309(4); EOTC argued that "any time spent by a temporary filling in for a permanent employee on leave does not count toward the six-month cap on temporary employment." (Order at 7.) The Board stated that the State's interpretation "would render the six-month limitation virtually meaningless. * * * [T]emporary employees could be assigned *permanently* to substitute for employees on leave, work for years, and never exceed [the statutory limit of] six months of employment because all of their time was spent as a substitute. Such an interpretation is nonsensical, especially given the indication that the legislature wanted to limit the long-term use of temporary employees." (Order at 8, footnote omitted.) To remedy the violation, the Board ordered EOTC to

cease and desist from employing temporary employees contrary to ORS 240.309; to meet and confer about losses suffered by Complainants; and—if unable to agree on the amount of those losses—to submit proposed remedies to the Board, which would then adopt the proposal that best effectuates the purposes of the law. In its supplemental order regarding the parties' unresolved remedial issues, the Board ordered: (a) the appropriate date for the temporary employees to begin receiving certain benefits (apparently those provided to regular employees) was the day after she was employed more than six months, not the point at which she had worked 1040 hours; and (b) EOTC is not obligated to reimburse the mother of one temporary employee for the health insurance costs that the mother paid for the temporary employee, during a time when EOTC was obligated to pay the employee's health insurance costs. (The Board reasoned that "relief under ORS 240.307(4) is limited to losses suffered by the injured party."(Order at 2.)) Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.3 8 *Refusal to arbitrate temporary employee's grievance—ORS 243.672(1)(g) complaint.* Deciding an unfair labor practice complaint under the Public Employee Collective Bargaining Act, the Board held that the State violated ORS 243.672(1)(g) by refusing to arbitrate a grievance. The State employed the grievant as a temporary employee from July 1982 to July 1983, July 1983 to July 1984, and July 1984 to November 1984, when he was appointed to a regular position. In January 1985, OPEU asserted that grievant became a regular employee, in its bargaining unit, after he completed one year of temporary service (in July 1983) and that he was entitled to benefits retroactive to that date. The State refused to arbitrate, arguing that the grievance challenged the State's application of the temporary employee statute and rule, not the parties' contract; the grievant was not eligible to grieve; the arbitrator had no authority under the contract to interpret the temporary appointment law; and the arbitrator had no authority to grant the requested relief. The Board rejected the State's arguments, concluded that the grievance was arguably arbitrable, and ordered the State to arbitrate. (For the Board's discussion of the relationship between the grievance and its jurisdiction over ORS 240 issues, see entry in section 1.5.) OPEU v. Executive Department, Labor Relations Division, Case No. UP-3-86, 9 PECBR 9201 (1986).

18.4 Remedies

18.4 1 Temporary employee, who was employed in a temporary position for over ten months, filed a complaint alleging that his temporary employment exceeded six months, in violation of ORS 240.309. Following an analysis used in *Fairbank v. EOTC*, Case No. MA-3-98 (March 2000), supplemental order (June 2000), recons denied (June 2000), the Board determined that the State did not employ Complainant either for an emergency or to replace an employee on leave and concluded that the State employed him for longer that six months, contrary to ORS 240.309. To remedy the violation, the Board reviewed the legislative history of the statute and ordered the State to pay Complainant the difference between his temporary employee pay and the pay and benefits he would have earned if employed as a regular employee, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. In addition, the Board ordered the State to cease and desist from employing temporary personnel in violation of the law. In its supplemental order, the Board ordered the State to reimburse Complainant for his actual medical and dental costs incurred as a result of not receiving such through insurance as a regular employee, including premium payments and out-of-pocket costs, beginning with the day after he completed six

months of service as a temporary employee and ending with his termination. Goetz v. Administrative Services Department, Case No. MA-8-00 (January 2002); supplemental order (February 2002).

18.4 2 The State conceded that its employment of Appellant, a temporary employee, for more than six months violated ORS 240.309 and agreed that the sole issue was the appropriate remedy. The Board stated that the remedy is a penalty calculated as "the difference between (1) what the temporary employee earned and accrued beginning six months after his initial hire until his termination, and (2) what that same employee would have earned or accrued had the State complied with the statute" and treated Complainant as a regular employee. The Board ordered the State to pay Complainant cost-of-living and step increases, holiday pay, medical and dental benefits, vacation leave, and sick leave; in addition, it ordered the State to cease and desist from employing temporary personnel in violation of the law. Complainant argued that he was also entitled to rights of regular employees under the terms of the State-OPEU collective bargaining agreement, including recall rights. The Board determined that he had failed to establish, on the record, what those rights were and therefore did not address that issue. In a supplemental order, the Board clarified that the State was to reimburse Complainant for his actual medical and dental costs incurred as a result of not receiving such through insurance as a regular employee, including premium payments and out-of-pocket costs, beginning with the day after he completed six months of service as a temporary employee and ending with his termination. Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002).

18.4 3 *Remedy*. To determine the amount of Complainant's "loss of wages, benefits and rights," under ORS 240.307(4)(a), the Board ordered Complainant and EOTC to meet and confer regarding an appropriate make-whole remedy. The Board specified that the parties, if unable to reach agreement, were to submit proposed remedies to the Board, which would then adopt the one that best effectuated the purposes of the law. The Board also ordered EOTC to discontinue employing temporary employees in excess of six months, unless in compliance with the statute. The Board also observed that, as a remedy for a violation, the statute does not allow the conversion of a temporary employee to permanent status. In its supplemental order regarding the parties' unresolved remedial issues, the Board ordered that the appropriate date for the temporary employees to begin receiving certain benefits (apparently those provided to regular employees) was the day after she was employed more than six months, not the point at which she had worked 1040 hours. Fairbank v. Eastern Oregon Training Center, Case No. MA-3-98 (March 2000), Chairman Stiteler concurring, Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

18.4 4 In its supplemental order regarding the parties' unresolved remedial issues, the Board ordered: (a) the appropriate date for the temporary employees to begin receiving certain benefits (apparently those provided to regular employees) was the day after she was employed more than six months, not the point at which she had worked 1040 hours; and (b) EOTC is not obligated to reimburse the mother of one temporary employee for the health insurance costs that the mother paid for the temporary employee, during a time when EOTC was obligated to pay the employee's health insurance costs. (The Board reasoned that "relief under ORS 240.307(4) is limited to losses suffered by the injured party.") Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000).

Chapter 19—Workers' Compensation Board Administrative Law Judges

19.1 Cases

19.1 1 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3) and Respondent's denial of his request for leave without pay. The Board ruled that it did not have jurisdiction to review whether the leave without pay denial violated ORS 240.086(1), citing *Payne v. Department of Commerce*, 61 Or App 165, 174 (1982), *recons* 62 Or App 433, *rev den* 295 Or 841 (1983), *cert den* 470 US 1083 (1985) and *Knutzen v. Department of Insurance and Finance*, 129 Or App 565 (1994). Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

19.1 2 Workers' Compensation Board administrative law judge appealed his removal from unclassified service and termination of employment under ORS 656.724(3). The Board stated that Respondent terminated Appellant because "he was, for medical reasons, unable to return to work and perform the duties required of his position, and because he failed to perform certain required duties." Appellant contended that his medical condition and performance issues were caused by harassment from his supervisors and therefore was not for good cause. The Board concluded that it did not have jurisdiction to determine whether Appellant's illness was job-related: "Had such a determination been made by a competent authority, we could consider that evidence in deciding whether Appellant's termination was the act of a reasonable employer. However, Appellant did not produce such evidence." After finding that Respondent proved Appellant was late issuing opinions and orders in a number of cases, the Board concluded that Respondent's decision to terminate Appellant was consistent with the reasonable employer standard and dismissed the appeal. Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003).

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[1]The *Supplement* also includes entries for some Board decisions issued between 1980 and 1984, which were inadvertently not included in the *The SPRL Digest 1980-1992*.

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Human Resources Department, Director's Office, LaBarre v., Case No. MA-20-98 (March 1999) (5.2.5).

Human Services Department, Abrego v., Case No. MA-14-07 (October 2007) (1.2, 11.2.1).

Human Services Department, Aguirre v., Case No. MA-25-02 (December 2002) (1.3, 1.4, 12.3.14).

Human Services Department, Ellis v., Case No. MA-28-02 (February 2003) (2.1, 5.2.2, 8.1).

Human Services Department, Stoudamire v., Case No. MA-4-03 (November 2003) (3.17a, 4.5, 11.2.1, 11.3, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.23, 16.2, 16.10).

Human Services Department, Balderas v., Case No. MA-10-02 (July 2002), AWOP, 189 Or App 596, 77 P3d 645, rev den, 336 Or 296, 84 P3d 815 (2003) (4,5, 5.2.2).

Human Services Department, Jones v., Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting (1.3, 2.1, 3.20a, 6.2, 12.3.11, 13.16).

Human Services Department, Moriarty v., Case No. MA-4-06 (October 2006) (5.2.2, 5.2.5, 12.3.11, 16.12).

Human Services Department, Medford Child Welfare Office, Thorson v., Case No. MA-15-04 (February 2005) (1.2, 11.2.3)

Human Services Department, Office of Human Resources, McGee v., Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005) (2.4, 3.4, 3.9, 6.10, 9.3, 12.3.12, 12.3.13, 12.5, 13.7, 13.15, 13.21, 13.27, 13.34).

Human Services Department, Office of Human Resources, Rieke v., Case No. MA-2-06 (August 2006) (1.3, 12.3.14).

Human Services Department, Oregon State Hospital, Belcher v., Case No. MA-7-07 (June 2008) (2.1, 3.14, 3.19, 3.24, 4.1, 6.4, 6.5, 6.7, 8.4, 12.1, 12.2, 12.3.7, 13.7, 13.20, 15.1, 15.4, 16.1, 16.9)

Human Services Department, Oregon State Hospital, Puckett v., Case No. MA-13-05 (March 2007) (4.5, 5.23, 5.25).

Human Services Department, Seniors and People with Disabilities, Bellish v., Case No. MA-23-03 (April 2004), recons (June 2004) (3.19, 3.24, 4.3, 6.4, 6.7, 8.4, 8.6, 9.1, 12.3.4, 13.9, 13.11, 13.13, 13.20, 13.34, 15.1, 16.13, 16.15).

Human Services Department, Seniors and People with Disabilities, Jepson v., Case No. MA-7-05 (November 2005) (5.25).

Human Services Department, Seniors and People with Disabilities, Lopez v., Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005) (1.3, 1.4, 2.1, 3.24, 6.15, 8.2, 8.4, 8.6, 8.8, 9.1, 16.2, 16.13, 16.15).

Humphreys v. Forestry Department, Case No. MA-1-00 (May 2000) (1.3, 12.3.2, 12.3.7).

Huntley v. OIT, Case No. MA-19-96 (January 1997) (1.11).

Jackson v. Corrections Department (SRCI), Case No. MA-5-98 (April 1998) (5.2.3).

Jackson-Graves v. Department of Justice, Division of Child Support, Case No. MA-11-05 (January 2006) (1.3, 12.3.3, 12.3.7).

Jepson v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-7-05 (November 2005) (5.25).

Jester v. Corrections Department, Case No. MA-9-00 (October 2000) (1.3, 12.3.14).

Jobe v. Oregon State Hospital, Case No. MA-7-94/management service discipline (September 1994). (4.5, 6.4, 12.2, 12.3.11, 12.5, 13.15, 13.17, 16.4).

Jones v. Human Services Department, Case No. MA-17-02 (February 2003), Member Thomas concurring and dissenting (1.3, 2.1, 3.20a, 6.2, 12.3.11, 13.16).

Jones v. Oregon Youth Authority, Case No. MA-1-05 (May 2005) (5.2, 12.3.5).

Judicial Fitness and Disability Commission, Rossi v., Case No. MA-30-02 (August 2003) (3.20a, 6.2, 6.5, 6.7, 11.2.7, 11.3, 13.33, 13.34, 13.35).

Justice Department, Cook v., Child Support Division, Case No. MA-20-01 (January 2002) (5.2.2, 12.3.12).

Justice Department, Division of Child Support, Jackson-Graves v., Case No. MA-11-05 (January 2006) (1.3, 12.3.3, 12.3.7).

Kirsch v. Public Utility Commission, Case No. MA-14-94/classified employee personnel action (September 1994). (5.2.5, 16.13).

Knutzen v. Department of Insurance and Finance, Oregon Occupational Safety and Health Division, Case No. MA-13-92/management service removal (May 1993), order on reconsideration (June 1993), reversed and remanded 129 Or App 565 (1994), order after remand (November 1994). (1.3, 3.6, 3.8, 3.24, 6.2, 8.4, 9.3, 12.1, 12.3.6, 15.1).

LaBarre v. Human Resources Department, Director's Office, Case No. MA-20-98 (March 1999) (5.2.5).

Land v. Office of Energy, Case No. MA-6-05 (December 2005) (5.25).

Lawson v. Department of Fish and Wildlife, Case Nos. MA-15/28-94/classified service pay reduction and dismissal (July 1995) (2.1, 4.1, 6.4, 6.5, 6.10, 11.2.1, 11.2.6, 11.3, 13.7, 13.18, 13.21, 13.35, 16.4).

Liepins v. Oregon State Hospital, Case No. MA-14-02 (December 2002) (1.3, 12.3.14).

Livesley v. Workers' Compensation Board, Case No. MA-5-01 (February 2003) (1.9, 1.15, 6.2, 6.6, 6.11, 13.29, 13.34, 13.35, 19.1).

Loftus v. Board on Public Safety Standards and Training, Case No. MA-8-95/classified service personnel action (July 1995) (1.1, 1.2).

Lopez v. Department of Human Services, Seniors and People with Disabilities, Case No. MA-2-04, interim order on jurisdiction (July 2005), recons (September 2005) (1.3, 1.4, 2.1, 3.24, 6.15, 8.2, 8.4, 8.6, 8.8, 9.1, 16.2, 16.13, 16.15).

Manion v. Department of Fish and Wildlife, Case No. MA-26-03 (June 2004), AWOP, 201 Or App 589, 121 P3d 23 (2005) (1.2, 1.8, 11.2.1, 16.15).

Martin v. Fairview Training Center, Case No. MA-3-99 (June 1999) (5.2.5).

McCoy v. Transportation Department, Case No. MA-8-02 (January 2003) (1.9, 6.6, 6.11, 8.3, 8.4, 11.2.3, 13.29, 16.13, 16.15).

McGee v. Department of Human Services, Office of Human Resources, Case No. MA-5-02 (March 2003), Member Thomas dissenting; reversed in part and remanded, 195 Or App 736, 99 P3d 337 (2004), order on remand (October 2005) (2.4, 3.4, 3.9, 6.10, 9.3, 12.3.12, 12.3.13, 12.5, 13.7, 13.15, 13.21, 13.27, 13.34).

McKinney v. Department of Transportation, Case No. MA-12-06 (December 2006) (5.2.3, 5.2.5, 11.2.7).

Meadowbrook v. State of Oregon, Department of Administrative Services, Case No. MA-17-93/management service removal/dismissal (July 1994), affirmed without opinion, 132 Or App 626, 889 P2d 392 (1995). (2.1, 3.17, 4.1, 7.1, 7.2, 8.6, 8.7, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.7, 13.13, 13.20, 13.34, 13.35, 16.9, 16.13).

Mendenhall v. Oregon State Hospital, Case No. MA-27-02 (December 2002) (1.3, 12.3.14).

Mental Health and Developmental Disability Services Division v. Oregon Public Employees Union, Local 503, Case No. AR-1-94/arbitration review (October 1994). (17.2, 17.3, 17.4).

Merrill v. Adult and Family Services, Case No. 1260/constructive discharge (March 1981). (3.7, 3.10, 10.2.1, 10.2.2, 10.2.16, 13.19).

Minard v. Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 (September 2006) (3.19, 3.20a, 4.1, 6.4, 6.5, 6.11, 8.9, 9.1, 12.1, 12.2, 12.3.11, 13.34, 13.35, 16.12).

Monem v. Department of Corrections, Case No. MA-05-07 (November 2007) (5.2.5, 5.3, 12.3.5).

Moriarty v. Department of Human Services, Case No. MA-4-06 (October 2006) (5.2.2, 5.2.5, 12.3.11, 16.12).

Mosley v. Department of Corrections, Case No. MA-7-93/management service removal/ restoration to classified service (November 1993). (2.1, 3.7, 6.4, 12.1, 12.2, 12.3.2, 12.3.5, 12.3.7, 12.5, 13.7, 13.18, 13.27, 16.4).

Motor Vehicles Department and Transportation Department v. OPEU, Case No. AR-1-98, 17 PECBR 814 (November 1998) (17.4).

Nass v. Employment Department, Case No. MA-6-03 (February 2004), order on motion to enforce remedy (October 2007) (3.19, 3.24, 4.3, 6.4, 6.7, 8.4, 8.5, 8.6, 12.1, 12.2, 12.3.1, 12.3.5, 13.8, 13.14, 13.17, 13.20, 13.35, 15.1, 15.4, 16.4, 16.6, 16.12, 16.13, 16.15).

Nehila v. Housing and Community Services, Community Resources Division, Case No. MA-3-02 (July 2002) (11.2.10).

Nelson v. Department of Corrections, Case No. MA-36-94/management service removal/ classified service restoration (January 1995). (1.3, 5.2.2, 5.2.3, 16.12).

Nelson v. Employment Department, Office of Human Resources, Case No. MA-8-05 (September 2005) (1.3, 12.3.14).

Nicholson v. Transportation Department, Case No. MA-10-00 (January 2002); supplemental order (February 2002) (1.5, 18.3, 18.4).

Norbeck v. Mental Health Division, et al., Case No. 1359/performance appraisal (March 1982), affirmed on reconsideration (May 1982). (4.1, 10.2.18).

Nygaard v. Workers' Compensation Department, Case No. 1122/position allocation (November 1980). (10.2.10).

Oatley v. Multnomah County, Case No. TA-1-92/transfer appeal (May 1993). (5.2.2, 16.12).

O'Brien v. Department of Commerce and Executive Department, Case No. 1111 (July 1980). (1.2, 1.8, 10.2.20).

OHSU, Hall v., Case No. MA-2-97 (April 1997) (1.12).

OIT, Huntley v., Case No. MA-19-96 (January 1997) (1.11).

O'Neil v. Fish and Wildlife Department, Case No. MA-22-98 (May 1999) (3.16, 5.2.2).

O'Neil v. Fish and Wildlife Department, Case No. MA-8-97 (September 1997) (5.2.2, 11.2.10).

OPEU, Transportation Department and Motor Vehicles Department v., Case No. AR-1-98, 17 PECBR 814 (November 1998) (17.4).

OPEU v. Executive Department, Labor Relations Division, Case No. UP-3-86, 9 PECBR 9201 (1986) (1.5, 18.3).

Oregon State Hospital, Liepins v., Case No. MA-14-02 (December 2002) (1.3, 12.3.14).

Oregon State Hospital, Mendenhall v., Case No. MA-27-02 (December 2002) (1.3, 12.3.14).

Oregon State Police v. Oregon State Police Officers' Association, Case No. AR-1-93/ arbitration award review (June 1993). (15.4, 17.4).

Oregon University System, Oregon Institute of Technology, Slinker v., Case No MA-15-07 (December 2007) (1.11, 2.5, 12.3.13).

Oregon Youth Authority, Jones v., Case No. MA-1-05 (May 2005) (5.2, 12.3.5).

Orton, et al., Rawls, et al., Rodriguez v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-95/position allocation/personnel action (September 1995) (1.1, 3.4, 3.8, 3.17, 3.20, 3.21, 3.24, 11.2.10).

OSPOA, State Police Department and Administrative Services Department v., Case No. AR-2-00, 18 PECBR 711 (July 2000), recons (November 2000), Member Thomas dissenting, appeal dismissed as moot and Board order vacated. (1.14, 9.3, 17.4).

OSPOA, State Police Department and Administrative Services Department v., Case No. AR-3-00/UP-30-00, 18 PECBR 771 (October 2000) (1.14, 17.1).

Parks and Recreation Department, Rau v., Case No. MA-2-01 (January 2002) (3.7, 3.9, 12.3.2, 12.3.12).

Parks and Recreation Department, Frost, Brown, and Hazelton v., Case Nos. MA-13-00 & MA-3-01 (June 2002) (16.2, 16.16, 18.2), AWOP 192 Or App 602, 89 P3d 95 (2004).

Parra v. Fish and Wildlife Department, Case No. MA-24-03 (November 2003) (1.2, 5.2.5).

Plank v. Department of Transportation, Case No. MA-17-90 (March 1992), interim compliance order (July 1992), compliance order (January 1993), modified in Vilches and Central Education

Association v. Central School District, Case No. UP-74-95, compliance order 17 PECBR 792 at 801 n.11 (1998) (15.1).

Peterson v. Department of General Services, Case No. MA-9-93/management service removal/classified service dismissal (April 1993), ruling on reconsideration (May 1993), decision on the merits (March 1994). (2.1, 3.11, 3.14, 3.19, 5.2.5, 6.7, 11.1, 11.2.1, 11.3, 12.1, 12.2, 12.3.1, 12.3.5, 12.5, 13.2, 13.3, 13.31, 16.13).

Potts v. Adult and Family Services Division, Case No. 1014/suspension (August 1980). (3.12, 3.23, 10.2.5, 10.3).

Public Safety Standards and Training Department, Herbst v., Case No. MA-5-06 (October 2008) (2.1, 3.17, 5.3, 6.4, 6.10, 8.4, 8.6, 12.1, 12.2, 12.3.1, 12.3.8, 13.4, 13.7, 13.20, 13.21, 16.4, 16.13).

Public Utility Commission and Transportation Department, Sabin, Vaughn, Moore, and Lingafelter v., Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting (1.13, 2.1, 3.4, 5.2.2, 5.2.3, 5.2.4, 7.1, 8.1, 11.2.8, 11.2.9, 11.2.12, 11.2.13, 16.13, 16.15).

Public Utility Commission, Reynolds v., MA-23-95 (November 1996) (11.2.8, 11.2.12, 16.14).

Public Utility Commission, Somdah v., Case No. MA-14-03 (September 2003) (3.16, 11.2.20).

Puckett v. Department of Human Services, Oregon State Hospital, Case No. MA-13-05 (March 2007) (4.5, 5.23, 5.25).

Rau v. Parks and Recreation Department, Case No. MA-2-01 (January 2002) (3.7, 3.9, 12.3.2, 12.3.12).

Rawls v. Secretary of State, Audits Division, Case No. MA-8-94/management service removal/classified service restoration (November 1994), upheld on reconsideration (December 1994). (12.1, 12.3.6).

Rawls, et al., Orton, et al., Rodriguez v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-95/position allocation/personnel action (September 1995) (1.1, 3.4, 3.8, 3.17, 3.20, 3.21, 3.24, 11.2.10).

Real Estate Agency, Deglow v., Case No. MA-9-06 (November 2006) (1.2, 11.2.3).

Real Estate Agency v. Oregon AFSCME, Local 3581, Case No. AR-2-93/arbitration award review (April 1994). (12.3.7, 17.4).

Reger v. Eastern Oregon Training Center, Case No. MA-17-98 (March 2000), Member Thomas dissenting; supplemental order (June 2000); recons denied (June 2000) (8.4, 16.13, 16.14, 18.1, 18.2, 18.3, 18.4).

Reynolds v. Public Utility Commission, MA-23-95 (November 1996) (11.2.8, 11.2.12, 16.14).

Richey v. State of Oregon, Corrections Division, Case No. A-1466/arbitration award review (June 1984). (5.2.3, 17.3, 17.4).

Rieke v. Department of Human Services, Office of Human Resources, Case No. MA-2-06 (August 2006) (1.3, 12.3.14).

Riley v. Veterans Affairs Department, Case No. MA-11-00 (September 2001) (6.12, 12.3.11, 13.16).

Rivers v. Adult and Family Services Division, Case No. 1334 (July 1981). (1.9, 3.8).

Robinson v. Adult and Family Services Division, Case No. 1343 (July 1981). (5.2.2, 16.12).

Rodriguez, Rawls, et al., Orton, et al. v. Secretary of State, Audits Division, Case Nos. MA-24/25/34-95/position allocation/personnel action (September 1995) (1.1, 3.4, 3.8, 3.17, 3.20, 3.21, 3.24, 11.2.10).

Rosevear and Tetzlaff v. Corrections Department, Case Nos. MA-4/6-97 (February 1998) (12.3.6, 12.3.17).

Rossi v. Judicial Fitness and Disability Commission, Case No. MA-30-02 (August 2003) (3.20a, 6.2, 6.5, 6.7, 11.2.7, 11.3, 13.33, 13.34, 13.35).

Russell v. Department of Transportation, Case No. 1286 (May 1981). (5.2.2, 16.12).

Sabin, Vaughn, Moore, and Lingafelter v. Public Utility Commission and Transportation Department, Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting (1.13, 2.1, 3.4, 5.2.2, 5.2.3, 5.2.4, 7.1, 8.1, 11.2.8, 11.2.9, 11.2.12, 11.2.13, 16.13, 16.15).

Savage v. Department of Transportation, Case No. MA-38-03 (February 2004) (1.3, 5.25, 12.3.16, 12.3.17).

SEIU, Local 503, Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA) v., Case No. AR-1-05, 21 PECBR 307 (April 2006) (1.14, 8.6, 16.13, 16.15, 17.4).

SEIU, Local 503 v. Office of Services for Children and Families, AR-3/4-03, 20 PECBR 829 (February 2005) (1.14, 15.1, 15.4, 17.4).

SEIU, Local 503, Department of Transportation v., Case No. AR-1-06, 21 PECBR 838 (May 2007) (8.6, 16.9, 16.13, 17.4).

Seufert v. Employment Division, Case Nos. 1231/1240 (November 1982). (5.2.5, 16.13).

Shepard-Lamb v. Adult and Family Services Division, Case No. MA-29-94/management service removal (October 1994). (1.3, 5.2.2, 16.12).

Slinker v. Oregon University System, Oregon Institute of Technology, Case No MA-15-07 (December 2007) (1.11, 2.5, 12.3.13).

Smith v. Fairview Training Center, Case No. MA-22-93/temporary employee dismissal (February 1994). (1.5, 3.24, 5.23, 16.13).

Smith v. Transportation Department, Case No. MA-4-01 (June 2001) (6.11, 11.2.1, 12.3.8, 13.11, 13.13, 13.15, 13.17, 13.20, 13.23, 13.24, 13.34, 13.35).

Smith v. Transportation Department, Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000) (1.3, 3.24, 5.2.2, 11.2.1, 12.3.1, 12.3.8, 16.2).

Somdah v. Public Utility Commission, Case No. MA-14-03 (September 2003) (3.16, 11.2.20).

State Police Department and Administrative Services Department v. OSPOA, Case No. AR-3-00/UP-30-00, 18 PECBR 771 (October 2000) (1.14, 17.1).

State Police Department and Administrative Services Department v. OSPOA, Case No. AR-2-00, 18 PECBR 711 (July 2000), recons (November 2000), Member Thomas dissenting, appeal dismissed as moot and Board order vacated. (1.14, 9.3, 17.4).

State Police Department Office of Emergency Management, Coyle and Busam v., Case No. MA-11-97 (July 1998) (1.2).

Stoudamire v. Human Services Department, Case No. MA-4-03 (November 2003) (3.17a, 4.5, 11.2.1, 11.3, 12.3.1, 12.3.5, 12.3.8, 12.5, 13.23, 16.2, 16.10).

Swartz v. Department of Environmental Quality, Case No. 1345 (April 1982). (9.1).

Tarnay v. Oregon Department of Transportation, Case No. MA-9-94/classified service termination (August 1994). (5.2.5, 16.13).

Taylor v. Corrections Department, Case No. MA-4-00 (May 2000) (1.3, 12.3.3).

Tenderella v. Department of Corrections, Case No. MA-13-94/classified employee termination (September 1994). (5.2.5, 16.13).

Tetzlaff and Rosevear v. Corrections Department, Case Nos. MA-4/6-97 (February 1998) (12.3.6, 12.3.17).

Thorson v. Department of Human Services, Medford Child Welfare Office, Case No. MA-15-04 (February 2005) (1.2, 11.2.3).

Transportation Department and Motor Vehicles Department v. OPEU, Case No. AR-1-98, 17 PECBR 814 (November 1998) (17.4).

Transportation Department and Public Utility Commission, Sabin, Vaughn, Moore, and Lingafelter v., Case No. MA-1/4/6/7-96 (May 1998), Member Whalen dissenting (1.13, 2.1, 3.4, 5.2.2, 5.2.3, 5.2.4, 7.1, 8.1, 11.2.8, 11.2.9, 11.2.12, 11.2.13, 16.13, 16.15).

Transportation Department, Ash v., Case No. MA-21-98 (June 2000), AWOP, 184 Or App 226, 56 P3d 968 (2002). (12.2, 12.3.7, 12.5, 13.36).

Transportation Department, Driver and Motor Vehicle Division, Minard v., Case No. MA-9-05 (September 2006) (3.19, 3.20a, 4.1, 6.4, 6.5, 6.11, 8.9, 9.1, 12.1, 12.2, 12.3.11, 13.34, 13.35, 16.12).

Transportation Department, Frederiks v., Case No. MA-19-97 (February 1998), AWOP 160 Or App 436, 981 P2d 401 (1999) (5.2.2).

Transportation Department, Hill v., Case No. MA-7-02 (November 2002) (1.3, 3.20a, 12.3.11, 13.34, 13.35).

Transportation Department, McKinney v., Case No. MA-12-06 (December 2006) (5.2.3, 5.2.5, 11.2.7).

Transportation Department, McCoy v., Case No. MA-8-02 (January 2003) (1.9, 6,6, 6.11, 8,3, 8.4, 11.2.3, 13.29, 16.13, 16.15).

Transportation Department, Nicholson v., Case No. MA-10-00 (January 2002); supplemental order (February 2002) (1.5, 18.3, 18.4).

Transportation Department, Plank v., Case No. MA-17-90 (March 1992), interim compliance order (July 1992), compliance order (January 1993), modified in Vilches and Central Education Association v. Central School District, Case No. UP-74-95, compliance order 17 PECBR 792 at 801 n.11 (1998) (15.1).

Transportation Department, Savage v., Case No. MA-38-03 (February 2004) (1.3, 5.25, 12.3.16, 12.3.17).

Transportation Department, Smith v., Case No. MA-4-01 (June 2001) (6.11, 11.2.1, 12.3.8, 13.11, 13.13, 13.15, 13.17, 13.20, 13.23, 13.24, 13.34, 13.35).

Transportation Department, Smith v., Case No. MA-2-98, classified service termination appeal dismissed and management service removal appeal remanded (April 1998), management service removal appeal dismissed (October 1998), Member Whalen dissenting, AWOP 166 Or App 238, 999 P2d 563 (2000) (1.3, 3.24, 5.2.2, 11.2.1, 12.3.1, 12.3.8, 16.2).

Transportation Department v. SEIU, Local 503, Case No. AR-1-06, 21 PECBR 838 (May 2007) (8.6, 16.9, 16.13, 17.4).

Trombley v. Eastern Oregon Training Center, MA-20-96 (October 1996) (1.5, 5.2.5).

Trotts v. Oregon State Hospital, Case No. MA-9-95/temporary appointment appeal (October 1995) (3.24, 16.13).

Turner v. Department of Corrections, Case No. MA-12-05 (July 2006) (1.3, 12.3.12).

Van Dyke v. Fish and Wildlife Department, Case No. MA-6-01 (November 2002) (1.9, 3.6, 6.2, 6.6, 11.2.1, 11.3, 13.20, 13.34, 13.35, 15.1, 16.3, 16.13, 16.15).

Veterans Affairs Department, Riley v., Case No. MA-11-00 (September 2001) (6.12, 12.3.11, 13.16).

Wang v. Geology and Mineral Industries Department, MA-12-02 (May 2003) (5.2.2, 11.2.20, 15.1).

Wesley v. Employment Department, Case No. MA-20-02 (October 2003) (9.1, 12.1, 12.3.5, 13.8, 13.9, 13.11, 13.23, 13.26, 16.4).

Western v. Vocational Rehabilitation Division, Case No. MA-14-93/management service removal (October 1993) (5.2.5, 16.13).

Whiteaker v. Oregon Liquor Control Commission, Case Nos. 961/972 (May 1980), reconsideration denied (July 1980), stay denied (September 1980) (6.7, 9.2, 10.2.1, 10.2.5, 10.3).

Williams v. Department of Energy, Case No. MA-14-04 (January 2005) (4.1, 4.5, 6.4, 8.1, 8.3, 8.4, 8.6, 11.2.3, 13.35, 15.1, 16.9, 16.15).

Wilson v. Oregon State Police, Case No. MA-30-94/classified service dismissal (June 1995) (3.11, 3.19, 3.22, 4.1, 8.6, 11.1, 11.2.1, 11.3, 13.35, 16.13).

Wilson v. Oregon State Police, Case No. MA-4-94/classified service discipline (May 1994) (1.1, 5.2.2, 16.12).

Wishart v. Adult and Family Services Division, Case No. MA-2-93/management service reclassification (May 1993) (1.3, 3.24, 5.2.2, 12.1, 12.3.14, 12.3.17).

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