THE

STATE PERSONNEL RELATIONS LAW

DIGEST SUPPLEMENT

January 1, 2017 – December 31, 2021

State of Oregon

Employment Relations Board

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Introduction

This volume supplements *The State Personnel Relations Law Digest 1980-1992, The State Personnel Relations Law Digest 1993-2008,* and *The State Personnel Relations Law Digest 2009-2016,* all of which were previously published by the Oregon Employment Relations Board. This volume is intended to be a digest of all State Personnel Relations Law (SPRL) decisions rendered by the Board and the appellate courts from January 1, 2017 through December 31, 2021.

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

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

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

Copies of the Board's SPRL decisions issued since January 1, 2004, are available on the agency's website: https://www.oregon.gov/erb/Pages/Appeal.aspx. Copies of SPRL orders may also be requested via online form: https://www.oregon.gov/erb/Pages/PublicRecord.aspx.

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[1]In recent cases in which an appellant has not responded to the ALJ or otherwise not actively pursued the appeal, the Board has dismissed the case on the basis of failure to pursue the appeal, rather than for "lack of prosecution." The name for this digest entry is updated to reflect that more contemporary phrasing.

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Chapter 1 – Jurisdiction of ERB

1.1—Jurisdiction of ERB, classified employees not included in bargaining unit

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, a Compliance Specialist 2 in the classified service, appealed his removal from trial service. Appellant's position was not in a bargaining unit. ORS 240.086(1) authorizes the Board to review any personnel action affecting an employee not in a bargaining unit that is alleged to be arbitrary or contrary to law or rule or taken for political reason. That grant of authority includes the authority to review trial service removals of classified employees not in a bargaining unit. *See* OAR 115-045-0020(1).

1.2—Jurisdiction of ERB, classified employees included in bargaining unit

A.S. v. Department of Corrections, Case No. MA-004-19 (October 2019): Appellant was employed as a Behavioral Health Specialist 2, a position in a collective bargaining unit represented by AFSCME. She was terminated from that position during trial service, and she appealed. The Board has jurisdiction to review personnel actions affecting a state employee "who is *not* in a certified or recognized appropriate collective bargaining unit." ORS 240.086(1) (emphasis added). Appellant did not dispute that she was removed during trial service from a classified service position in a collective bargaining unit. As a result, the Board had no jurisdiction over the appeal. *See Epling v. State of Oregon, Department of Human Services*, Case No. MA-022-14 (February 2015); *Woosley v. State of Oregon, Department of Agriculture*, Case No. MA-012-13 (November 2013). The Board dismissed the appeal.

1.3—Jurisdiction of ERB, management service

L.H. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-007-19 (November 2020): Management service employee appealed a written reprimand and a letter of expectations. The employer subsequently withdrew the written reprimand, leaving only the letter of expectations at issue in the appeal. ORS 240.570(4) enumerates the personnel actions over which the Board has jurisdiction. Letters of expectation are not listed among the personnel actions that may be appealed to this Board under ORS 240.570(4), citing *M.T. v. State of Oregon, Department of Human Services, Stabilization and Crisis Unit*, Case No. MA-008-19 at 2 (October 2019), and *Burleigh v. Department of Transportation*, Case No. MA-16-96 (June 1996). The Board dismissed the appeal for lack of jurisdiction.

M.T. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-008-19 (October 2019): Management service employee appealed a letter of expectations. ORS 240.570(4) enumerates the personnel actions over which the Board has jurisdiction. Letters of expectation are not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

C.S. v. Oregon Health Authority, Case No. MA-007-18 (October 2018): Management service employee appealed his paid administrative leave pending an investigation into his activities at work. Appellant conceded that the basis of his appeal was solely his placement on paid administrative leave, but he contended that the manner in which he was placed on leave should be considered disciplinary because it was an "adverse action," relying on judicial decisions analyzing claims under 42 USC § 1983, Cal Lab Code § 1102.5, and Cal Gov't Code § 12940(a).

ORS 240.570(4) identifies the personnel actions over which the Board has jurisdiction. Paid administrative leave is not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

B.H. v. Oregon Health Authority, Case No. MA-009-16 (January 2017): Management service employee appealed the reclassification of her position. The appeal stated, "We are appealing this decision as the OHA Innovator Agent Team and would ask that you accept this appeal on behalf of all the current" employees on that team. The appeal listed five employees, but only Appellant signed the appeal, and only Appellant signed and submitted subsequent documents and corresponded with the administrative law judge. The State Personnel Relations Law does not expressly authorize the Board to consider an appeal filed by one appellant on behalf of a putative class of non-party employees. Consequently, the Board treated the appeal as an appeal only by Appellant of the reclassification of her position from a higher salary range to a lower range (although Appellant's salary was red circled). Citing *Rieke v. State of Oregon, Department of Human Services, Office of Human Resources*, Case No. MA-2-06 at 3 (August 2006), the Board held that it does not have jurisdiction to hear appeals of reclassification decisions concerning management service employees. The Board dismissed the appeal.

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Among other arguments, Appellant alleged a violation of Department of Human Services rule 70.000.02. The Board did not consider that issue, because it does not have jurisdiction over violations of agency rules. *See Honeywell v. State of Oregon, Department of Corrections*, Case No. MA-014-10 (February 2011); *Payne v. Dept. of Commerce*, 61 Or App 165, 174, 656 P2d 361 (1982). (On the remaining issues, the Board concluded that the Department did not violate SPRL in removing Appellant from management service and dismissing her from state service.) The Board dismissed the appeal.

Chapter 2 – Relationship to Constitution

2.1—Fourteenth Amendment due process clause (see also 4.2)

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Appellant argued that the Department did not provide him adequate and timely notice of the charges against him. The pre-removal letter charged Appellant with reporting to work under the influence of alcohol, which the Department described as a "lack of sound professional judgment" and a violation of the Maintaining a Professional Workplace Policy. During the pre-removal meeting, in response to reports that other employees had smelled alcohol on Appellant's breath, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. Appellant denied that he was under the influence of alcohol at work. Appellant's manager terminated Appellant's employment because he concluded that Appellant was not honest and because he questioned the integrity of Appellant's ability to make decisions. Appellant argued that he was not afforded due process because the pre-removal letter did not specifically advise Appellant that dishonesty during the investigation could affect the Department's decision. Noting that the investigator informed Appellant during the fact-finding interview that honesty was expected, the Board held that Appellant had constitutionally adequate

notice regarding what conduct was in question. Appellant also argued that the Department's notice of the charge was untimely because it did not allow him to obtain a blood alcohol test. The Board held that due process did not impose such a requirement, which would require an employer to charge an employee with intoxication before the employer has reasonable opportunity to investigate the underlying allegation. Appellant also argued that the investigation was unfair because the pre-removal letter did not notify Appellant that a supervisor made an "off-the-record" comment about him during the human resources investigation. However, the Board held that due process required that Appellant receive notice of the charges against him before a decision was made, but it did not require that Appellant be furnished with the evidence gathered against him. Moreover, there was no evidence that the Department relied on the supervisor's off-the-record remark in making its decision. The Board concluded that the timing and adequacy of the notice to Appellant was sufficient, citing *Tupper v. Fairview Hospital*, 276 Or 657, 661-62, 556 P2d 1340 (1976), and *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992) (*Tupper* requirements applied in a removal setting).

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list (and ultimately did so). The Brady listing caused Appellant to be unable to perform the litigation-related functions of her job, which led the Department to dismiss her. Appellant argued that the Department's acceptance of the Brady listing effectively deprived her of due process of law because she was unable to contest the district attorney's decision. The Board rejected this argument, because "[t]he Department's duty was to provide due process to Appellant regarding its decision to terminate her employment, not to make certain that Appellant received due process from the DA's office." The Board dismissed the appeal.

Chapter 3 – Terms and Definitions

3.4—"Arbitrary"—ORS 240.086(1)

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, a Compliance Specialist 2 in the classified service, appealed his removal from trial service. Appellant's position was not in a bargaining unit. Pursuant to ORS 240.086(1), a classified employee not in a bargaining unit may appeal a personnel action affecting that employee that is alleged to be arbitrary or contrary to law or rule or taken for political reason. An action is arbitrary if it is taken without cause, unsupported by substantial evidence, or nonrational. The Board dismissed the appeal.

3.7—"Constructive discharge/discipline"

C.S. v. Oregon Health Authority, Case No. MA-007-18 (October 2018): Management service employee appealed his paid administrative leave pending an investigation into his activities at work. Appellant contended that the manner in which he was placed on leave should be considered disciplinary because it constituted an "adverse action." Appellant relied on judicial decisions analyzing claims under 42 USC § 1983, Cal Lab Code § 1102.5, and Cal Gov't Code § 12940(a).

However, ORS 240.570(4) identifies the personnel actions over which the Board has jurisdiction, and paid administrative leave is not listed. The Board dismissed the appeal for lack of jurisdiction.

3.16—"Personnel Action"—ORS 240.086(1)

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, a Compliance Specialist 2 in the classified service, appealed his removal from trial service. Appellant's position was not in a bargaining unit. ORS 240.086(1) authorizes the Board to review any personnel action affecting an employee not in a bargaining unit that is alleged to be arbitrary or contrary to law or rule or taken for political reason. A personnel action includes a trial service removal. *See* OAR 115-045-0020(1). The Board dismissed the appeal.

3.17—"Political reasons"—ORS 240.560(3)

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, a Compliance Specialist 2 in the classified service, appealed his removal from trial service. Appellant's position was not in a bargaining unit. Appellant contended that he was removed because of his safety concerns and his insistence that Respondent provide particular types of personal protective equipment during the COVID-19 pandemic. The statutory term "political reason" refers only to partisan politics, and Appellant failed to demonstrate any relationship between party politics and his removal from trial service. *See Rodriguez, et al. v. Secretary of State, Division of Audits*, Case Nos. MA-24/25/34-94 at 17 (September 1995) (citing *Foster v. Executive Department, Emergency Management Division*, Case No. MA-15-87 (September 1988)). The Board dismissed the appeal.

3.17a—"Progressive discipline"

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). Appellant had worked for the Department of Corrections for 11 years and had a positive service record with no prior discipline. A reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal or removal, or the employee's behavior probably will not be improved through progressive discipline. *See Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12 (April 2013). Appellant was the only manager in the institution during the graveyard shift and was the officer-in-charge. He met for approximately 90 minutes in a closed office with a younger subordinate, and in that meeting, he engaged in an extremely personal and inappropriate conversation. On other occasions, Appellant also called a subordinate male corrections officer by an inappropriate nickname. The Board explained that the question of whether a reasonable employer would forego progressive discipline on these facts presented a "very close question." The Board rejected the Department's assertion that Appellant's conduct was sufficiently serious or unmitigated that progressive discipline was unnecessary. Appellant's conduct was not the type of serious misconduct justifying summary dismissal, such as the unauthorized use of public funds or saving pornography on a work computer. The Board concluded, however, that the Department established the second and independent reason that an employer may forego progressive discipline—that the employee's behavior probably will not be improved through progressive measures. Here, Appellant did not appear to understand how his highly personal conversation and inappropriate comments would be taken by the classified

employee. He also appeared not to take full responsibility for his actions, and he minimized his use of the inappropriate nickname. In light of the amount of training Appellant had received, prior workplace counseling for making a comment "contrary to team play," and his failure to acknowledge his mistakes and take accountability, a reasonable employer could conclude that Appellant's conduct probably would not be improved through progressive measures. The Board dismissed the appeal.

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service for being under the influence of alcohol at work on one occasion. The Board concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. Appellant was a 19-year employee with no record of disciplinary history. Given that Appellant's conduct was only an isolated incident, the Board concluded that an objectively reasonable employer would have given Appellant a chance to correct his behavior through progressive discipline. The Board distinguished previous cases in which management service employees were terminated for alcohol use on the basis that the employees had previous discipline and involved more than isolated incidents. Further, Appellant did not embarrass the agency by interacting with the public in an impaired condition and did not make any mistakes in his case handling because of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Appellant's peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline. The Board modified the discipline to a six-month suspension.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (3) disclosing to subordinates private facts about the employment status of others in the work group; and (4) making demeaning remarks about his subordinates to others in the work group. Appellant worked for the Department for approximately 6.5 years and had no disciplinary record. Appellant was, however, coached twice by his manager for being "flippant" and for minimizing employee concerns. The lack of progressive discipline was justified in this case because of the seriousness of the charges. Appellant himself described the gender dysphoria evaluations as "grossly delinquent," even though he had been directed multiple times to ensure that they were completed. Moreover, compliance with the requirement was a significant matter; the record indicated that there were serious risks associated with the particular inmate population, including the risk of increased sexual violence and a higher suicide rate. Overall, the significance of all Appellant's conduct justified the absence of progressive discipline. The Board dismissed the appeal.

V. v. Oregon, Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of

laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; spent $1,000 in state funds to renew personal software without disclosing the purchase; and installed unauthorized software on his State laptop (including software that masked his computer's address in order to hide the real computer address of laptop). Although Appellant had no prior discipline, he had worked for the State for only approximately 22 months. The Board concluded that progressive discipline was not required because of the seriousness of Appellant's conduct, noting that the Board has previously upheld the removal and dismissal of management service employees for personal use of state resources. *See Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 (November 2003) (personal use of State-issued cell phone, incurring several thousand dollars in charges); *Wesley v. Employment Department*, Case No. MA-20-02 (October 2003) (appellant accessed ex-husband's confidential records for personal use in a child support dispute). The Board reasoned that there were no distinguishing characteristics in this case. The Board dismissed the appeal.

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by engaging in sexual activity with a subordinate at work during work time, showing pornographic photos to subordinates, using demeaning language to refer to the subordinate with whom he was having the relationship, and pressuring the subordinate to report to work on New Year's Eve to help respond to a snowstorm even though he knew that she had been drinking alcohol at a local tavern where they were both celebrating with family and friends. The Board concluded that the Department met its burden to prove that Appellant engaged in sexual activity with the subordinate at work, showed inappropriate photos to subordinates, and used inappropriate language. The Department did not prove that Appellant acted inappropriately on New Year's Eve. Appellant had worked for the Department for 21 years, including 12 in the management service, had a good performance record and had demonstrated dedication, including working a 30-hour shift through the night in a snowstorm. Nonetheless, the "Department is entitled to expect more from its managers than just adequate technical performance and dedication during emergencies." The Board also considered the fact that Appellant was counseled by his district manager to be mindful of boundaries after an anonymous complainant asserted that Appellant had an inappropriately familiar relationship with the subordinate with whom he ultimately had a sexual relationship. The Board also took into account the fact that Appellant appeared not to fully comprehend the inappropriateness of his conduct or its impact on the workplace. Appellant referred to his conduct as an "affair," and expressed remorse for its impact on his marriage, but not for its impact on the workplace. The Board concluded that progressive discipline was not necessary because lesser discipline would likely not have been effective in changing Appellant's behavior. The Board dismissed the appeal.

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. On December 27, Appellant's manager directed Appellant to call an individual who had expressed potential concerns about another DHS employee's spouse. Due to the nature of the potential concerns, all the DHS managers involved, including Appellant, understood that they might have to make a child abuse screening report.

Although another manager had already spoken with the individual about her concerns, Appellant was directed to call the individual again because there was a perceived language barrier, and Appellant could speak with the individual in her native language. Appellant called as directed and learned that the individual's potential concern was not based on personal knowledge, and that the individual had not had contact with the employee or their spouse for three to four years.

Because the inquiry concerned a DHS employee, Appellant's manager had previously stated that she (the manager) would find out where any child abuse screening report should be submitted. Appellant's manager, however, took no action to determine where any screening report should be submitted between December 27 and January 5. On Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to a DHS office in another county. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the other DHS office on Wednesday, January 10, and reported what she had learned on the phone call. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse.

DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting in this situation. A reasonable employer "applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures." *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citations omitted). The Board concluded that Appellant's conduct, failure to timely comply with a directive to submit a screening report, was not egregious. Further, the Board concluded that it was unlikely that Appellant would repeat the conduct that resulted in this case, because Appellant accepted responsibility for not promptly submitting the screening report, acknowledged the gravity of her mistake, and had made over 100 child abuse reports during her career. The Board reinstated Appellant to the management service and modified the discipline to a letter of reprimand in lieu of a salary reduction.

3.19—"Reasonable Employer" (see also 11.2.1 and 12.1)

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. On December 27, Appellant's manager directed Appellant to call an individual who had expressed potential concerns about another DHS employee's spouse. Due to the nature of the potential concerns, all the DHS managers involved, including Appellant, understood that they might have to make a child abuse screening report.

Although another manager had already spoken with the individual about her concerns, Appellant was directed to call the individual again because there was a perceived language barrier, and Appellant could speak with the individual in her native language. Appellant called as directed and learned that the individual's potential concern was not based on personal knowledge, and that the individual had not had contact with the employee or their spouse for three to four years.

Because the inquiry concerned a DHS employee, Appellant's manager had previously stated that she (the manager) would find out where any child abuse screening report should be submitted. Appellant's manager, however, took no action to determine where any screening report should be submitted between December 27 and January 5. On Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to a DHS office in another county. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the other DHS office on Wednesday, January 10, and reported what she had learned on the phone call. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse.

The Board concluded that DHS proved that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment. However, the Board concluded that DHS did not prove the remaining charge that Appellant failed to make a mandatory child abuse report as required by ORS 419B.010.

The Board concluded that DHS did not act as a reasonable employer in removing Appellant without progressive discipline. A reasonable employer "disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee's length of service and service record***." *Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12 (April 2013) (quoting *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2011)). An employer may hold a management service employee to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. The Board also considers the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. The Board's precedent also gives weight to the effect of the management service employee's actions on the mission and image of the agency and the extent to which the employee properly used judgment and discretion.

Assessing whether DHS acted as a reasonable employer, the Board agreed with DHS that it needed to be able to rely on its managers to understand their child abuse reporting obligations and to model dedication to child safety. The Board concluded, however, that there was no evidence that Appellant did not understand her obligations or that she acted arbitrarily without appropriate regard for child safety. Rather, Appellant was managing multiple pressing matters, including one that related to a high-needs child, and made a judgment error in how she prioritized competing tasks. Moreover, Appellant's delay in reporting the concerns was not known to her subordinate staff, so Appellant's delay could not have undermined her managerial effectiveness with them. Moreover, Appellant did not treat the screening report with less urgency than it was treated by her peer managers, so her effectiveness on the management team was not necessarily undermined. Based on these facts, including Appellant's prompt acknowledgment of her own error, the Board concluded that a reasonable employer would not decide that Appellant's actions undermined

DHS's mission or image. Moreover, Appellant's error was not egregious, justifying immediate dismissal without progressive discipline. The Board also took into account the fact that, before the investigatory interview of Appellant, DHS did not check its own records about whether and when Appellant made the screening report, which likely would have resulted in eliciting more pertinent information from Appellant. Finally, the Board considered that DHS did not take fully into account the volume and content of Appellant's workload during the days before she made the screening report; rather, DHS minimized Appellant's explanation for her delay by characterizing it as an attempt to shift blame to others, which undermines any conclusion that DHS acted as a reasonable employer. The Board reinstated Appellant to the management service and modified the discipline to a letter of reprimand in lieu of a salary reduction.

3.22—"Unfitness to render effective service" – ORS 240.555

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's office's Brady Review Committee, Appellant was in fact placed on the Brady list. Restoring Appellant, who was properly removed from the management service, to her former Social Services Specialist position in the classified service would not change her Brady listing. Her Social Services Specialist position would require significant participation in court. The Brady listing rendered Appellant "unfit to render effective service" under ORS 240.555. The Board dismissed the appeal.

Chapter 4 - Issuance of Personnel Action and Statement of Charges

4.2—Clarity and specificity of charges

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Appellant argued that the Department did not provide him adequate and timely notice of the charges against him. The pre-removal letter charged Appellant with reporting to work under the influence of alcohol, which the Department described as a "lack of sound professional judgment" and a violation of the Maintaining a Professional Workplace Policy. The pre-removal letter did not mention an "off-the-record" comment a supervisor made during the human resources investigation, in which she speculated that Appellant might have a longstanding drinking problem. During the pre-removal meeting, in response to the reports that other employees had smelled alcohol on Appellant's breath, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. Appellant denied that he was under the influence of alcohol at work. Appellant's manager terminated Appellant's employment because he concluded that Appellant was not honest and because he questioned the integrity of Appellant's ability to

make decisions. Although the pre-removal letter did not specifically advise Appellant that dishonesty during the investigation could affect the Department's decision, Appellant had constitutionally adequate notice regarding what conduct was in question, and the investigator informed him during the fact-finding interview that honesty was expected. The Board also rejected Appellant's argument that the Department was required to provide him notice within a time frame that would have allowed him to obtain a blood alcohol test, and declined to impose such a requirement, which would require an accusation of intoxication before the employer has reasonable opportunity to investigate. With regard to Appellant's argument that the investigation was unfair because Appellant was not aware of the supervisor's speculative "off-the-record" comment, due process required that Appellant receive notice of the charges against him before a decision was made, but it did not require that Appellant be furnished with the evidence gathered against him. Moreover, the Department did not suggest that it considered Appellant's impairment to be anything other than an isolated incident; thus, there was no evidence that the Department relied on the supervisor's off-the-record remark in making its decision. The Board concluded that the timing and adequacy of the notice to Appellant was sufficient, citing *Tupper v. Fairview Hospital*, 276 Or 657, 661-62, 556 P2d 1340 (1976), and *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992) (*Tupper* requirements applied in a removal setting).

Chapter 5 – Appeal Procedure

5.2.2—Timeliness rulings (see also 16.12)

R.Y. v. Department of Corrections, Case No. MA-001-20 (September 2020): Appellant, a correctional lieutenant, acknowledged that he failed to timely file an appeal of a written reprimand. Appellant argued that the Department did not properly or accurately inform him of his appeal rights because the human resources employee he consulted informed him that (1) his internal Department grievance was untimely because it was more than 30 days from the date of the reprimand, (2) she was new in her position and unsure how to proceed, and (3) he could file an appeal with the Board. However, the human resources employee's statements were not a defense to the lack of timeliness because an employer has "no statutory duty to inform" disciplined employees of the proper appeal procedure. *See Lamb v. Cleveland*, 28 Or App 343, 346, 559 P2d 529, *rev den*, 278 Or 393 (1977). The Board also rejected Appellant's argument that his untimely appeal should be accepted because he did not fully understand his appeal rights. The Board is required by statute and its precedent to strictly enforce the statutory deadline for filing an appeal, even in cases where the management service employee was not aware of the deadline and missed it only by a short period.

M.T. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-008-19 (October 2019): On September 18, 2019, Appellant filed an appeal of a letter of expectations dated August 15, 2019. Pursuant to ORS 240.560(1), a SPRL appeal must be either postmarked (if mailed) or received by the Board (if delivered by a method other than mailing) "not later than 30 days after the effective date" of the appealed personnel action. Appellant submitted an appeal by email that was received by the Board at 8:58 p.m. on September 17, 2019. Pursuant to OAR 115-010-0010(10), a document "received after 5 p.m. is considered to be filed on the following business day." Appellant's appeal was therefore filed on September 18, 2019, which was 34 days after the date of the letter of expectations. The Board dismissed the appeal as untimely (and on the bases of lack of jurisdiction pursuant to ORS 240.570(4) and failure to pursue the appeal).

A.B. v. Public Utilities Commission, Case No. MA-006-17 (August 2017): On June 26, 2017, Appellant filed an appeal of removal from trial service in the unrepresented classified service, effective May 25, 2017. Pursuant to ORS 240.560(1) and OAR 115-045-0005, a SPRL appeal must be either postmarked or received by the Board within 30 days after the effective date of the disputed personnel action. Here, the appeal was filed 32 days after the effective date of the removal. The Board dismissed the appeal as untimely.

5.2.5—Failure to pursue appeal (formerly identified as lack of prosecution)[2]

L.H. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-007-19 (November 2020): Management service employee appealed a written reprimand and a letter of expectations. The employer subsequently withdrew the written reprimand, leaving only the letter of expectations at issue in the appeal. Appellant asserted that, before he would withdraw his appeal, he wanted Respondent's human resources department to confirm in writing that it had withdrawn the written reprimand. Respondent subsequently filed a motion to dismiss on the basis that it had withdrawn the written reprimand, and the Board has no jurisdiction to hear an appeal of a letter of expectations. The ALJ directed the appellant to show cause by October 2, 2020, why the appeal should not be dismissed. Appellant did not respond. Citing *A.B. v. State of Oregon, Public Utilities Commission*, Case No. MA-006-17 at 1 (August 2017), and *Templeton v. State of Oregon, Department of Human Services*, Case No. MA-020-15 at 1 (April 2016), the Board dismissed the appeal because Appellant failed to pursue the appeal. See also the entry at 1.3 (Board has no jurisdiction to hear appeals of letters of expectation).

M.T. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-008-19 (October 2019): On September 18, 2019, Appellant filed an appeal of a letter of expectations dated August 15, 2019. Respondent filed a motion to dismiss on the basis of lack of jurisdiction under ORS 240.570 and because the appeal was untimely. The Administrative Law Judge issued an order to show cause, directing Appellant to submit any response to the motion by October 8, 2019. Appellant did not file a response. Citing *Templeton v. State of Oregon, Department of Human Services*, Case No. MA-020-15 (April 2016), the Board dismissed the appeal.

A.B. v. Public Utilities Commission, Case No. MA-006-17 (August 2017): On June 26, 2017, Appellant filed an appeal of removal from trial service in the unrepresented classified service, effective May 25, 2017. The Administrative Law Judge asked Appellant twice to show cause why the appeal should not be dismissed as untimely. Appellant was informed that a failure to respond would result in a recommendation that the appeal be dismissed. Appellant did not respond. Citing *Templeton v. State of Oregon, Department of Human Services*, Case No. MA-020-15 (April 2016), the Board dismissed the appeal.

[2]In recent cases in which an appellant has not responded to the ALJ or otherwise not actively pursued the appeal, the Board has dismissed the case on the basis of failure to pursue the appeal, rather than "lack of prosecution." The name for this digest entry is updated to reflect that more contemporary phrasing.

Chapter 6 – Affirmative Defenses

6.2—Bad faith employer actions

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (3) disclosing to subordinates private facts about the employment status of others in the work group; and (4) making demeaning remarks about his subordinates to others in the work group. Appellant argued that the Department acted unreasonably by disciplining him for conduct at issue in two investigations. The first investigation was initiated in response to a complaint by one of his subordinates on November 20, 2018, and the second investigation resulted from a complaint on January 29, 2019, about gender dysphoria evaluations. The Board rejected Appellant's argument. Because the investigations involved critical areas of Appellant's managerial and supervisory authority, and started around the same period of time, it was reasonable for the Department to consider both issues together.

6.4—Denial of charges

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). Appellant had worked for the Department of Corrections for 11 years and had a positive service record with no prior discipline. Appellant was the only manager in the institution during the graveyard shift and was the officer-in-charge. Appellant had an approximately 90-minute meeting in a closed office with a younger subordinate. Initially, the subordinate expressed distress about her ongoing divorce and a recent death in her family. As the conversation progressed, Appellant and the subordinate discussed the subordinate's libido, the subordinate's relationship with another corrections officer who was her roommate, Appellant's dating life, and Appellant's opinion of "back piercings." During the conversation, Appellant asked questions about the subordinate's roommate, implying that the roommate was being manipulative in order to hasten the transition of the relationship from platonic to romantic. Appellant also complained to the subordinate that another corrections officer had spread rumors about Appellant during Appellant's divorce. Unrelated to the meeting, Appellant also called a male corrections officer by the nickname "Randi," which was the name of an ex-girlfriend of another male corrections officer. Although Appellant denied that he acted inappropriately, the Board concluded that the Department proved the charges, and that the Department had lost trust and confidence in Appellant as part of the management team. The Department was entitled to expect its managers to model appropriate behavior and appropriate manager-subordinate boundaries, and not to disparage union-represented classified staff. Appellant's conduct fell short of the Department's expectations, which were high, but not arbitrary or unreasonable. The Board dismissed the appeal.

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Multiple employees observed that Appellant appeared to be under the influence

of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol. He stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found it implausible that Appellant's use off hand sanitizer before he went to work would explain the odor detected by employees hours later. The Board also found that even assuming a ketogenic diet can cause fruity smelling breath, it does not explain why the smell was not mistaken for intoxication on previous occasions. Moreover, Appellant did not offer these explanations at the fact-finding hearing and "his delayed explanations lack credibility."

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed from management service and terminated for failing to timely complete gender dysphoria evaluations of adults-in-custody, as well as for various inappropriate comments to and about subordinates. At hearing, Appellant denied the charge related to gender dysphoria evaluations. However, Appellant had clearly and repeatedly admitted earlier that the gender dysphoria evaluations were untimely and that he had not adequately overseen or followed up on them. Consequently, the Board was not persuaded by Appellant's subsequent denials, citing *Morisette v. Children's Services Division*, Case No. 1410 at 22 (March 1983) (manager's prior admission of performance deficiency not undone by his subsequent denial).

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. On December 27, Appellant's manager directed Appellant to call an individual who had expressed potential concerns about another DHS employee's spouse. Due to the nature of the potential concerns, all the DHS managers involved, including Appellant, understood that they might have to make a child abuse screening report. Although another manager had already spoken with the individual about her concerns, Appellant was directed to call the individual again because there was a perceived language barrier, and Appellant could speak with the individual in her native language. Appellant called as directed and learned that the individual's potential concern was not based on personal knowledge, and that the individual had not had contact with the employee or their spouse for three to four years.

Because the inquiry concerned a DHS employee, Appellant's manager had previously stated that she (the manager) would find out where any child abuse screening report should be submitted. Appellant's manager, however, took no action to determine where any screening report should be submitted between December 27 and January 5. On Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to a DHS office in another county. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the other DHS office on Wednesday, January 10, and reported what she had learned on the phone call. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse.

DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. Appellant denied that she had failed to make a screening report as directed, and that she failed to comply with ORS 419B.010. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting because Appellant had no contact with either the child allegedly abused or the alleged abuser.

A reasonable employer "applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures." *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citations omitted). The Board concluded that Appellant's conduct, failure to timely comply with a directive to submit a screening report, was not egregious. Further, the Board concluded that it was unlikely that Appellant would repeat the conduct because she accepted responsibility for not promptly submitting the screening report, acknowledged the gravity of her mistake, and had made over 100 child abuse reports during her career. The Board reinstated Appellant to the management service and modified the discipline to a letter of reprimand in lieu of a salary reduction.

6.11—Physical or mental condition

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol. He stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found it implausible that Appellant's use offhand sanitizer before he went to work would explain the odor detected by employees hours later. The Board also found that even assuming a ketogenic diet can cause fruity smelling breath, it does not explain why the smell was not mistaken for intoxication on previous occasions. Moreover, Appellant did not offer these explanations at the fact-finding hearing and "his delayed explanations lack credibility."

6.15—Other

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. On December 27, Appellant's manager directed Appellant to call an individual who had expressed potential concerns about another DHS employee's spouse. Due to the nature of the potential concerns, all the DHS managers involved, including Appellant, understood that they might have to make a child abuse screening report. Although another manager had already spoken with the individual about her concerns, Appellant was directed to call the individual again because there was a perceived language barrier, and Appellant could speak with the individual in her native language. Appellant called as directed and learned that the individual's potential concern was not based on personal knowledge, and that the individual had not had contact with the employee or their spouse for three to four years.

Because the inquiry concerned a DHS employee, Appellant's manager had previously stated that she (the manager) would find out where any child abuse screening report should be submitted. Appellant's manager, however, took no action to determine where any screening report should be submitted between December 27 and January 5. On Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to a DHS office in another county. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the other DHS office on Wednesday, January 10, and reported what she had learned on the phone call. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse.

DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant failed to follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting in this situation. With regard to the first two charges, Appellant asserted that her delay in making the screening report from January 5 until January 10 was due, in part, to her decision to prioritize tasks related to the current safety of a high-needs teen over reporting the allegations about the years-old possible conduct at issue in the screening report. The Board reasoned that a reasonable employer would have taken into account these conflicting demands on Appellant's time. The Board ordered that Appellant's removal from the management service (and effective dismissal from state service) be modified to a letter of reprimand in lieu of salary reduction, and that DHS reinstate Appellant and pay her back pay and benefits.

Chapter 8 – Hearing

8.3—Burden of going forward with evidence

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed from management service and terminated for failing to timely complete gender dysphoria evaluations of adults-in-custody, as well as for various inappropriate comments to and about subordinates. Appellant argued that Behavioral Health Services administrators prolonged the investigations and did not give him enough staff support, and that the real reason he was terminated was because he had information about the suicide of an adult-in-custody. The Board was not persuaded by these arguments; Appellant offered no evidence that meaningfully supported these defenses. The burden of presenting evidence to support a fact or position in a contested case "rests on the proponent of the fact or position." ORS 183.450(2).

8.4—Burden of proof

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, an unrepresented Compliance Specialist 2 in the classified service, appealed his removal from trial service. In all cases other than appeals from discipline under ORS 240.555 or 240.570(3), the appellant has the burden of proof. Appellant appealed based on ORS 240.086(1), on the basis that his removal from trial service was arbitrary or contrary to law or rule or taken for political reason. Consequently, Appellant had the burden of proof. The ALJ's decision to permit Respondent to present its case first did not shift the burden of proof to Respondent. The ALJ asked the Respondent to present its case first as a practical matter because the employer controls most of the information about the personnel action and having it proceed first tends to save time and resources. *See Williams v. State of Oregon, Department of Energy*, Case No. MA-14-04 at 2-3, 12-13 (January 2005) (citing *Wang v. State of Oregon, Department of Geology and Mineral Industries*, Case No. MA-12-02 at 16 (May 2003)).

8.9—Objections to Recommended Order

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): After the Board dismissed his appeal, Appellant, a correctional lieutenant, filed a petition for reconsideration. Appellant asserted that five facts in the final order were incorrect. Appellant had not objected to those facts in the recommended order. OAR 115-010-0090(1) requires parties to file specific written objections to facts or conclusions in a recommended order. When a party does not object to a finding of fact or conclusion of law in a recommended order, the potential objections are "unpreserved and waived," citing *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-022-16 at 12 n.14, 27 PECBR 112, 123 n.14 (2017), *aff'd*, 298 Or App 332, 447 P3d 50 (2019); *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11 at 11, 25 PECBR 449, 459 (2013); OAR 115-045-0030. Consequently, in response to Appellant's petition for reconsideration, the Board declined to reconsider those facts.

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

11.2.1—Dismissal

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. Restoring Appellant, who was properly removed from the management service, to her former Social Services Specialist position in the classified service would not change her Brady listing. The classified social services specialist position would require significant participation in court. The Brady listing therefore rendered Appellant "unfit to render effective service" under ORS 240.555. The Board dismissed the appeal.

11.2.3—Trial service removal

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, a Compliance Specialist 2 in the classified service, appealed his removal from trial service. Appellant's position was not in a bargaining unit. ORS 240.086(1) authorizes the Board to review any personnel action affecting an employee not in a bargaining unit that is alleged to be arbitrary or contrary to law or rule or taken for political reason. Appellant worked in a port of entry where trucks entering the state are weighed and inspected. After he accepted the position but before his official start date, he posted about the port of entry on a Google Reviews web page. Appellant posted a positive rating, a photograph of the United States and Oregon flags, and the comment, "Come on by! I don't know half of you as well I would like, and I like less than half of you as well you deserve," a misquotation of a line from a movie. During trial service, Appellant received "meets expectations," "exceeds expectations," and "does not meet expectations" ratings on his evaluations. Appellant failed to check in with his manager and lead worker on multiple occasions and was difficult to reach and unresponsive. During the week before his removal, Appellant failed to communicate with either his manager or lead worker at all. Respondent removed Appellant based on Appellant's failure to check in during trial service, in addition to the Google Reviews post. Appellant argued that he was removed from trial service as a "preemptive strike" to avoid the expense of a possible FMLA claim and because of his safety concerns related to the COVID-19 pandemic. However, the final doctor's note that Appellant submitted indicated that Appellant could return to work without limitations, and the evidence indicated that Respondent took Appellant's safety concerns seriously and did not remove him from trial service because of them. Moreover, the phrase "political reason" in ORS 240.086(1) refers only to partisan politics, and Appellant failed to demonstrate any relationship between party politics and his removal from trial service. The Board dismissed the appeal.

A.B. v. Public Utilities Commission, Case No. MA-006-17 (August 2017): On June 26, 2017, Appellant filed an appeal of a removal from trial service in the unrepresented classified service, effective May 25, 2017. Pursuant to ORS 240.560(1) and OAR 115-045-0005, a SPRL appeal must be either postmarked or received by the Board within 30 days after the effective date of the disputed personnel action. The Board dismissed the appeal as untimely.

Chapter 12 – Management Service Employment (effective July 1981)

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

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service because an independent entity, the District Attorney's office, placed her on the Brady list, which effectively precluded her from being able to perform the court-related duties of her position, which took approximately 10 to 15 percent of her time. ORS 240.570(3) provides that the employer can lawfully remove an employee from management service for an inability to fully and faithfully perform the duties of the position satisfactorily. The Board concluded that the District Attorney's Brady listing of Appellant rendered her unable to fully and faithfully perform the duties of her management service position satisfactorily. Therefore, the employer acted as a reasonable employer in removing Appellant from the management service after she was Brady-listed. In addition, the Board concluded that the Brady listing would render Appellant "unfit to render effective service" under ORS 240.555. The Board, therefore, declined to address the employer's argument that Appellant had no right to be restored to her prior classified position under recent statutory amendments (*see* Or Laws 2014, ch 22, § 1).

12.2—Management service conduct expectations

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). Appellant was the only manager in the institution during the graveyard shift and was the officer-in-charge. Appellant had an approximately 90-minute meeting in a closed office with a younger subordinate. Initially, the subordinate expressed distress about her ongoing divorce and a recent death in her family. As the conversation progressed, Appellant and the subordinate discussed the subordinate's libido, the subordinate's relationship with another corrections officer who was her roommate, Appellant's dating life, and Appellant's opinion of "back piercings." During the conversation, Appellant asked questions about the subordinate's roommate, implying that the roommate was being manipulative in order to hasten the transition of the relationship from platonic to romantic. Appellant also complained that another corrections officer had spread rumors about Appellant during Appellant's divorce. Unrelated to the meeting, Appellant also called a male corrections officer by the nickname "Randi," which was the name of an ex-girlfriend of another male corrections officer. The Department was entitled to expect its managers to model appropriate behavior, appropriate manager-subordinate boundaries, cultivate trust in the workplace, and not to disparage union-represented classified staff. Appellant's conduct fell short of the Department's expectations, which were high but not arbitrary or unreasonable. The Board concluded that the Department proved this conduct, and that the

Department had lost trust and confidence in Appellant as part of the management team. The Board dismissed the appeal.

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. Appellant promptly left the workplace with a co-supervisor when asked to do so. The Board concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. However, the Board determined that removal from the management service was not objectively reasonable. The Board was not convinced that Appellant could no longer be an effective member of the management team; his failure to model good behavior was an isolated incident, he did not embarrass the agency by interacting with the public in an impaired condition, and he did not make any mistakes in his case handling as a result of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Further, both his peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline, given his 19-year tenure with no record of disciplinary history. The Board modified the discipline to a six-month suspension.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave and had exhausted her FMLA leave, and that, when not on leave, the subordinate frequently called in sick; (3) disclosing to subordinates private facts about the employment status of others in the work group, including that he intended to terminate a member of his work group before he informed that employee directly and later asking the work group to find "negative documentation" about the terminated employee, that one subordinate had "issues" with a former employer, that one subordinate had previously been terminated and had obtained her job back after litigation, and that he would not give a subordinate a lead worker position because she was pregnant; and (4) making demeaning remarks about his subordinates to others in the work group. At hearing, Appellant argued that the Department's policies and procedures for handling gender dysphoria were unethical, overly complicated, unnecessarily time consuming, inconsistent with the DSM-5, and unlawfully discriminatory, and that the policies were therefore to blame, at least in part, for Appellant's failures. The Board rejected this argument; a manager is not excused from following a directive simply because the manager believes it is invalid. Moreover, here, one of Appellant's job duties was to recommend revisions to agency policy and procedure, but Appellant did not do so. Appellant also argued that the Department's decision makers had "no right judging the clinical decisions" of Appellant and his staff. However, most of the Department's charges did not involve clinical judgments and, even as to the clinical judgments, SPRL does not require that higher-level managers making disciplinary decisions have particular licensure or qualifications. With regard to the comments to and about subordinates, Board precedent provides that "a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments," quoting *Helfer v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). The Board dismissed the appeal.

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop. Appellant's work on his personal research project was not explained to or authorized by any laboratory managers, and significantly affected Appellant's staff, who were troubled by his work on a project that he had not explained to them and appeared to be working on privately. Appellant's actions reflected negatively on the laboratory, and the Board has previously upheld the removal and dismissal of management service employees for personal use of state resources. The Board dismissed the appeal.

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by engaging in sexual activity with a subordinate at work during work time, showing pornographic photos to subordinates, using demeaning language to refer to the subordinate with whom he was having the relationship, and pressuring the subordinate to report to work on New Year's Eve to help respond to a snowstorm, even though he knew that she had been drinking alcohol at a local tavern where they were both celebrating with family and friends. The Board concluded that the Department met its burden to prove that Appellant engaged in sexual activity with the subordinate at work, showed inappropriate photos to subordinates, and used inappropriate language. The Department did not prove that Appellant acted inappropriately on New Year's Eve. The Board reasoned that Appellant's sexual activity at work with a subordinate violated "even the most basic standard of managerial competence." The Department was entitled to expect its managers to model appropriate boundaries and conduct. Further, Appellant's language, including a reference to his romantic partner "PMS-ing," was not only generally inappropriate, but was "specifically demeaning to women" and inappropriate on that basis. The Board also noted the significance of the fact that Appellant had recruited the subordinate with whom he had the relationship through a Department program designed to increase diversity in the workplace, and thus Appellant's conduct "could impair the effectiveness of a Department initiative to enhance diversity in the workplace." Further, by "sharing inappropriate photographs and making inappropriate comments, Appellant communicated to subordinates that maintaining a workplace welcoming to and safe for women was not only not important, but was worthy of ridicule." The Board dismissed the appeal.

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. On December 27, Appellant's manager directed Appellant to call an individual who had expressed potential concerns about another DHS employee's spouse. Due to the nature of the potential concerns, all the DHS managers involved, including Appellant, understood that they might have to make a child abuse screening report. Although another manager had already spoken with the individual about her concerns, Appellant

was directed to call the individual again because there was a perceived language barrier, and Appellant could speak with the individual in her native language. Appellant called as directed and learned that the individual's potential concern was not based on personal knowledge, and that the individual had not had contact with the employee or their spouse for three to four years.

Because the inquiry concerned a DHS employee, Appellant's manager had previously stated that she (the manager) would find out where any child abuse screening report should be submitted. Appellant's manager, however, took no action to determine where any screening report should be submitted between December 27 and January 5. On Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to a DHS office in another county. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the other DHS office on Wednesday, January 10, and reported what she had learned on the phone call. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse.

DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting in this situation.

With regard to the first two charges, Appellant asserted that her delay in making the screening report from January 5 until January 10 was due, in part, by her decision to prioritize tasks related to the current safety of a high-needs teen over reporting the allegations about the years-old possible conduct at issue in the screening report. The Board reasoned that a reasonable employer would have taken into account these conflicting demands on Appellant's time. Moreover, a reasonable employer "applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures." *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citations omitted). The Board concluded that Appellant's failure to timely comply with a directive to submit a screening report was not egregious under the circumstances in this case. Further, the Board concluded that it was unlikely that Appellant would repeat the conduct that resulted in this case, because Appellant accepted responsibility for not promptly submitting the screening report, acknowledged the gravity of her mistake, and had made over 100 child abuse reports during her career. The Board reinstated Appellant to the management service and modified the discipline to a letter of reprimand in lieu of a salary reduction.

12.3.1—Dismissal, management service employees

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her 12 years of prior satisfactory service precluded discipline. The Board concluded that "these factors are irrelevant" because she was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

12.3.2—Constructive discharge/discipline, management service employees

C.S. v. Oregon Health Authority, Case No. MA-007-18 (October 2018): Management service employee appealed his placement on paid administrative leave pending an investigation into his activities at work. Appellant contended that the manner in which he was placed on leave should be considered disciplinary because it constituted an "adverse action." Appellant relied on judicial decisions analyzing claims under 42 USC § 1983, Cal Lab Code § 1102.5, and Cal Gov't Code § 12940(a). ORS 240.570(4) identifies the types of personnel actions over which the Board has jurisdiction. Paid administrative leave is not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

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

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). Appellant had worked for the Department of Corrections for 11 years, and had a positive service record with no prior discipline. Appellant was the only manager in the institution during the graveyard shift and was the officer-in-charge. Appellant had an approximately 90-minute meeting in a closed office with a younger subordinate. Initially, the subordinate expressed distress about her ongoing divorce and a recent death in her family. As the conversation progressed, Appellant and the subordinate discussed the subordinate's libido, the subordinate's relationship with another corrections officer who was her roommate, Appellant's

dating life, and Appellant's opinion of "back piercings." During the conversation, Appellant asked questions about the subordinate's roommate, implying that the roommate was being manipulative in order to hasten the transition of the relationship from platonic to romantic. Appellant also complained to the subordinate that another corrections officer had spread rumors about Appellant during Appellant's divorce. Unrelated to the meeting, Appellant also called a male corrections officer by the nickname "Randi," which was the name of an ex-girlfriend of another male corrections officer. The Board concluded that the Department proved this conduct, and that the Department had lost trust and confidence in Appellant as part of the management team. The Department was entitled to expect its managers to model appropriate behavior and appropriate manager-subordinate boundaries, and not to disparage union-represented classified staff. Appellant's conduct fell short of the Department's expectations, which were high but not arbitrary or unreasonable. The Board dismissed the appeal.

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol. He stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found Appellant's explanations implausible, and concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. However, the Board determined that removal from the management service was not objectively reasonable. Appellant was a 19-year employee with no record of disciplinary history. Given that Appellant's conduct was not anything more than an isolated incident, the Board concluded that an objectively reasonable employer would have given Appellant a chance to correct his behavior through progressive discipline. The Board was not convinced that Appellant could no longer be an effective member of the management team; his failure to model good behavior was an isolated incident, he did not embarrass the agency by interacting with the public in an impaired condition, and he did not make any mistakes in his case handling as a result of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Further, both his peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline. The Board modified the discipline to a six-month suspension.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave and had exhausted her FMLA leave, and that, when not on leave, the subordinate frequently called in sick; (3) disclosing to subordinates private facts about the employment status of others in the work group, including that he intended to terminate a member of his work group before he informed that employee directly and later asking the work

group to find "negative documentation" about the terminated employee, that one subordinate had "issues" with a former employer, that one subordinate had previously been terminated and had obtained her job back after litigation, and that he would not give a subordinate a lead worker position because she was pregnant; and (4) making demeaning remarks about his subordinates to others in the work group. At hearing, Appellant argued that the Department's policies and procedures for handling gender dysphoria are unethical, overly complicated, unnecessarily time consuming, inconsistent with the DSM-5, and unlawfully discriminatory, and that the policies were therefore to blame, at least in part, for Appellant's failures. The Board rejected this argument; a manager is not excused from following a directive simply because the manager believes it is invalid. Moreover, here, one of Appellant's job duties was to recommend revisions to agency policy and procedure, but Appellant did not do so. Appellant also argued that the Department's decision makers had "no right judging the clinical decisions" of Appellant and his staff. However, most of the Department's charges did not involve clinical judgments and, even as to the clinical judgments, SPRL does not require that higher-level managers making disciplinary decisions have particular licensure or qualifications. With regard to the comments to and about subordinates, Board precedent provides that "a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments," quoting *Helfer v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). The Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. The Board dismissed the appeal.

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop. Appellant's work on his personal research project was not explained to or authorized by any laboratory managers, and significantly affected Appellant's staff, who were troubled by his work on a project that he had not explained to them and appeared to be working on privately. Appellant's actions reflected negatively on the laboratory, and the Board has previously upheld the removal and dismissal of management service employees for personal use of state resources. The Board dismissed the appeal.

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by engaging in sexual activity with a subordinate at work during work time, showing pornographic photos to subordinates, using demeaning language to refer to the subordinate with whom he was having the relationship, and pressuring the subordinate to report to work on New Year's Eve to help respond to a snowstorm, even though he knew that she had been drinking alcohol at a local tavern where they were both celebrating with family and friends. The Board concluded that the Department met its burden to prove that Appellant engaged in sexual activity with the subordinate at work, showed inappropriate photos to subordinates, and used inappropriate language. The Department did not prove that Appellant acted inappropriately on New Year's Eve. The Board reasoned that Appellant's sexual activity at work with a subordinate violated "even the most basic

standard of managerial competence." Further, Appellant's language, including a reference to his romantic partner "PMS-ing," was not only generally inappropriate, but was "specifically demeaning to women." The Board also gave weight to the effect of Appellant's actions on the mission and image of the Department, and noted the significance of the fact that Appellant had recruited the subordinate with whom he had the relationship through a Department program designed to increase diversity in the workplace, and thus Appellant's conduct "could impair the effectiveness of a Department initiative to enhance diversity in the workplace." Further, by "sharing inappropriate photographs and making inappropriate comments, Appellant communicated to subordinates that maintaining a workplace welcoming to and safe for women was not only not important, but was worthy of ridicule." The Board dismissed the appeal.

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant appealed her removal from the management service as a Principal Executive Manager C (and dismissal from state service) with the Department of Human Services (DHS). Appellant supervised a child welfare unit. Another manager in Appellant's office was told by a caseworker that the mother (VG) in an assessment that she was conducting expressed concerns that her husband may have used drugs in the past with the husband of another DHS caseworker in Appellant's office. The manager was unable to obtain further information from VG because VG spoke primarily Spanish. On December 27, Appellant's manager directed Appellant, who speaks Spanish, to call VG to discuss VG's concerns about the DHS caseworker. Appellant's manager also said that she would find out where any child abuse report should be submitted in light of the fact that the parent in question was a DHS employee. Appellant called VG as directed and learned that VG had no first-hand knowledge of the DHS employee's husband using drugs, and that she had not had contact with the employee's husband for three to four years. Appellant's manager took no action to determine where any screening report should be submitted between December 27 and January 5. Ultimately, on Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to another DHS office. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the identified DHS office on Wednesday, January 10, and reported what VG had told her about the DHS caseworker's husband. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse. DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 requires mandatory reporting when a DHS employee has reasonable cause to believe that (1) any child the employee comes in contact with has been abused, or (2) any person the employee comes in contact with has abused a child, and Appellant had no contact with either the DHS's employee's children or husband, and even assuming that she did, Appellant had no "reasonable cause" to believe that child abuse had occurred. The Board concluded that Appellant's failure to promptly submit the screening report pursuant to her manager's directive, although a significant breach of DHS's expectations, was not so egregious

that DHS could reasonably conclude that Appellant should be removed from the management service without progressive discipline. The Board reinstated Appellant and modified her discipline to a letter of reprimand in lieu of a salary reduction.

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her 12 years of prior satisfactory service precluded discipline. The Board concluded that "these factors are irrelevant" because she was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

12.3.14—Classification/allocation of position

B.H. v. Oregon Health Authority, Case No. MA-009-16 (January 2017): Management service employee appealed the reclassification of her position from a higher salary range to a lower range (although Appellant's salary was red-circled). Citing *Rieke v. State of Oregon, Department of Human Services, Office of Human Resources*, Case No. MA-2-06 at 3 (August 2006), the Board held that it does not have jurisdiction to hear appeals of reclassification decisions concerning management service employees. The Board dismissed the appeal.

12.3.17—Other personnel actions

L.H. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-007-19 (November 2020): Management service employee appealed a written reprimand and a letter of expectations. The employer subsequently withdrew the written reprimand, leaving only the letter of expectations at issue in the appeal. ORS 240.570(4) enumerates the personnel actions over which the Board has jurisdiction. Letters of expectation are not listed among the personnel actions that may be appealed to this Board under ORS 240.570(4), citing *M.T. v. State of Oregon, Department of Human Services, Stabilization and Crisis Unit*, Case No. MA-008-19 at 2 (October 2019), and *Burleigh v. Department of Transportation*, Case No. MA-16-96 (June 1996). The Board dismissed the appeal for lack of jurisdiction.

M.T. v. Department of Human Services, Stabilization and Crisis Unit, Case No. MA-008-19 (October 2019): Management service employee appealed a letter of expectations. ORS 240.570(4) enumerates the personnel actions over which the Board has jurisdiction. Letters of expectation are not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

C.S. v. Oregon Health Authority, Case No. MA-007-18 (October 2018): Management service employee appealed his paid administrative leave pending an investigation into his activities at work. Appellant contended that the manner in which he was placed on leave should be considered disciplinary because it constituted an "adverse action." Appellant relied on judicial decisions analyzing claims under 42 USC § 1983, Cal Lab Code § 1102.5, and Cal Gov't Code § 12940(a). ORS 240.570(4) identifies the personnel actions over which the Board has jurisdiction. Paid administrative leave is not listed in ORS 240.570(4). The Board dismissed the appeal for lack of jurisdiction.

12.5—Appropriateness of personnel action, management service employees

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). In considering the appropriate level of discipline, the Board determines whether the level of discipline is "objectively reasonable in light of all the circumstances," quoting *Rodriguez v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-14-11 at 9 (July 2012). Appellant was the only manager in the institution during the graveyard shift, and was the officer-in-charge. He met for approximately 90 minutes in a closed office with a younger subordinate. As the conversation progressed, Appellant and the subordinate discussed the subordinate's libido; the subordinate's relationship with another corrections officer who was her roommate; Appellant's dating life; and Appellant's opinion of "back piercings." During the conversation, Appellant asked questions about the subordinate's roommate, implying that the roommate was being manipulative in order to hasten the transition of the relationship from platonic to romantic. Appellant also complained to the subordinate that another corrections officer had spread rumors about Appellant during Appellant's divorce. Unrelated to the meeting, Appellant also called a male corrections officer by the name of an ex-girlfriend of another male corrections officer. The Board considered Appellant's tenure (11 years), positive service record with no prior discipline, that he was fairly new in his management position, and that he was orally counseled twice during his management service, including making an ill-considered remark that his supervisor described as contrary to "team play." Although that counseling was not about making inappropriate comments to or about subordinates, it put Appellant on notice that managers must be aware of the impact of their statements about others. Further, Appellant had received substantial training on relevant topics, including on boundaries, interpersonal communications, and respectful workplace. The Board concluded that Appellant's conduct was not sufficiently serious or unmitigated to justify the absence of progressive discipline. However, the Department established the second, independent reason that a reasonable employer may forego progressive discipline—by showing that Appellant's behavior probably would not be improved through progressive measures. The Board concluded that removal from the management service was objectively reasonable in light of all the circumstances, and dismissed the appeal.

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal

from state service for being under the influence of alcohol at work on one occasion. The Board concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. However, the Board determined that removal from the management service was not objectively reasonable. Appellant was a 19-year employee with no record of disciplinary history. Given that Appellant's conduct was not anything more than an isolated incident, the Board concluded that an objectively reasonable employer would have given Appellant a chance to correct his behavior through progressive discipline. The Board distinguished previous cases in which management service employees were terminated for alcohol use on the basis that the employees had previous discipline and more than isolated incidents were involved. The Board was not convinced that Appellant could no longer be an effective member of the management team; his failure to model good behavior was an isolated incident, he did not embarrass the agency by interacting with the public in an impaired condition, and he did not make any mistakes in his case handling as a result of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Further, both his peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline. The Board modified the discipline to a six-month suspension.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (3) disclosing to subordinates private facts about the employment status of others in the work group, including that he intended to terminate a member of the work group; and (4) making demeaning remarks about his subordinates to others in the work group. With respect to the demeaning remarks, Appellant called one employee a "whistle blower" who was "not trainable," told one employee that if she challenged him it "would not go well for her" in the end, and referred to his staff as idiots or "stupid."

Appellant worked for the Department for approximately 6.5 years and had no disciplinary record. Appellant was, however, coached twice by his manager for being "flippant" and for minimizing employee concerns. The lack of progressive discipline was justified because of the seriousness of the conduct. Appellant himself described the gender dysphoria evaluations as "grossly delinquent," even though he had been directed multiple times to ensure that they were completed. Moreover, compliance with the evaluation requirement was a matter of significance; the record indicated that there were serious risks associated with the particular inmate population, including the risk of increased sexual violence and a higher suicide rate. The Board also noted that Appellant communicated that he had little respect for the gender dysphoria policies, and believed that they existed only "to save a couple of bucks on hormone treatment." The administrator of Behavioral Health Services testified that Appellant's situation was ultimately "not recoverable," and multiple employees in his workgroup testified that they did not wish to work under him. Consequently, the Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. Under the circumstances, dismissal was appropriate. The Board dismissed the appeal.

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop (including software that masked his computer's address in order to hide its real computer address). Appellant had worked for the State for approximately 22 months with no prior discipline. The Board reasoned that Appellant's actions were not insignificant, particularly given his management-service status and high-level responsibilities. OHA's standards were not arbitrary, particularly when the manager, like Appellant, is responsible for a significant component of its operations and is vested with substantial authority, including expenditure authority. Appellant acknowledged that he engaged in improper conduct, but argued that he was entitled to some form of progressive discipline. The Board concluded that progressive discipline was not required because of the seriousness of the conduct and the fact that Appellant used state resources for personal use. The Board took into account that Appellant acknowledged that some of his conduct was wrong and apologized to his managers. However, Appellant did not appear to fully realize the gravity of his actions. Further, Appellant's actions lacked proper judgment and discretion, which negatively reflected on the mission and image of the Public Health Laboratory. The Board concluded that the disciplinary action was the action of a reasonable employer and dismissed the appeal.

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by engaging in sexual activity with a subordinate at work during work time, showing pornographic photos to subordinates, using demeaning language to refer to the subordinate with whom he was having the relationship, and pressuring the subordinate to report to work on New Year's Eve to help respond to a snowstorm, even though he knew that she had been drinking alcohol at a local tavern where they were both celebrating with family and friends. The Board concluded that the Department met its burden to prove that Appellant engaged in sexual activity with the subordinate at work, showed inappropriate photos to subordinates, and used inappropriate language. The Department did not prove that Appellant acted inappropriately on New Year's Eve. The Board reasoned that Appellant's sexual activity at work with a subordinate violated "even the most basic standard of managerial competence." Further, Appellant's language, including a reference to his romantic partner "PMS-ing," was not only generally inappropriate, but was "specifically demeaning to women." Appellant had worked for the Department for 21 years, including 12 in the management service, had a good performance record and had demonstrated dedication, including working a 30-hour shift through the night in a snowstorm. Nonetheless, the "Department is entitled to expect more from its managers than just adequate technical performance and dedication during emergencies." The Board also took into account the fact that Appellant was counseled by his district manager to be mindful of boundaries after an anonymous complainant asserted that Appellant had an inappropriately familiar relationship with the subordinate with whom he ultimately had a sexual relationship. The Board also took into account the fact that Appellant appeared not to fully comprehend the inappropriateness of his conduct or its impact on the workplace; he referred to his conduct as an "affair," and expressed remorse for its impact on his

marriage, but not for its impact on the workplace. Given all the facts, the Board concluded that progressive discipline was not necessarily because lesser discipline would likely not have been effective in changing Appellant's behavior. The Board dismissed the appeal.

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant was a Principal Executive Manager C with the Department of Human Services (DHS), with an 18-year service record and no prior discipline. Appellant supervised a child welfare unit. Another manager in Appellant's office was told by a caseworker that the mother (VG) in an assessment that she was conducting expressed concerns that her husband may have used drugs in the past with the husband of another DHS caseworker. Appellant's manager instructed that manager to obtain more information from VG about her concerns, but he was unable to do so because VG spoke primarily Spanish. On December 27, Appellant's manager directed Appellant, who speaks Spanish, to call VG to discuss VG's concerns about the DHS caseworker. Appellant's manager also said that she would find out where any child abuse report should be submitted in light of the fact that the parent in question was a DHS employee. Appellant called VG as directed and learned that VG had no first-hand knowledge of the DHS employee's husband using drugs, and that she had not had contact with the employee's husband for three to four years. Appellant's manager took no action to determine where any screening report should be submitted between December 27 and January 5. Ultimately, on Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to another DHS office. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the identified DHS office on Wednesday, January 10, and reported what VG had told her about the DHS caseworker's husband. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse. DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting in these circumstances.

In considering the appropriate level of discipline, the Board determines whether a level of discipline is "objectively reasonable in light of all the circumstances." *Rodriguez v. State of Oregon, Department of Human Services*, Case No. MA-14-11 at 9 (July 2012) (quoting *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008)). In dismissal cases, the Board attempts to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the actions, and the likelihood of repeated misconduct. The Board concluded that removal from the management service was not an appropriate level of discipline. The Board reasoned that the seriousness of Appellant's judgment error should be evaluated by taking into account her 18-year tenure, good service record, prompt acknowledgement of her error, and the fact that she had made over 100 child abuse reports

during her career, making it unlikely that she would repeat the conduct that resulted in this case. The Board reinstated Appellant and modified the discipline to a letter of reprimand in lieu of a salary reduction.

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and discovery delays. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her 12 years of prior satisfactory service precluded discipline. The Board disagreed and explained that "these factors are irrelevant" because Appellant was not disciplined, but was "removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

Chapter 13 – Cause for Discipline or Removal

13.3—Alcohol-related conduct as cause for discipline or removal

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service for being under the influence of alcohol in the office on one occasion. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol. He stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found Appellant's explanations implausible and concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. The Board was not convinced, however, that the Department had lost trust and confidence in Appellant. The Board also rejected the Department's argument that Appellant could no longer be an effective member of the management team; his failure to model good behavior was an isolated incident, he did not embarrass the agency by interacting with the public in an impaired condition, and he did

not make any mistakes in his case handling as a result of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Further, both his peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline, given his 19-year tenure, lack of a record of discipline, and the fact that this was an isolated incident. The Board modified the discipline to a six-month suspension.

13.5—Complaint, failure to investigate/initiate

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant appealed her removal from the management service as a Principal Executive Manager C (and dismissal from state service) with the Department of Human Services (DHS). Appellant supervised a child welfare unit. Another manager in Appellant's office was told by a caseworker that the mother (VG) in an assessment that she was conducting expressed concerns that her husband may have used drugs in the past with the husband of another DHS caseworker in Appellant's office. Appellant's manager instructed the supervisor to obtain more information from VG about her concerns, but he was unable to do so because VG spoke primarily Spanish. On December 27, Appellant's manager directed Appellant, who speaks Spanish, to call VG to discuss VG's concerns about the DHS caseworker. Appellant's manager also said that she would find out where any child abuse report should be submitted in light of the fact that the parent in question was a DHS employee in Appellant's office. Appellant called VG as directed and learned that VG had no first-hand knowledge of the DHS employee's husband using drugs, and that she had not had contact with the employee's husband for three to four years. Appellant's manager took no action to determine where any screening report should be submitted between December 27 and January 5. Ultimately, on Friday, January 5, Appellant's manager consulted with a screening supervisor, who instructed Appellant that day to submit a child abuse screening report to another DHS office. Appellant first saw the email from the screening supervisor after 5:00 p.m. on January 5, when the other DHS office was closed. Appellant ultimately called the DHS office the screening supervisor identified on Wednesday, January 10, and reported what VG had told her about the DHS caseworker's husband. The DHS employee who took the report closed the matter the same day because there was no indication of child abuse. DHS removed Appellant from the management service for three reasons: (1) failure to follow management expectations when Appellant did not follow the directive to make a screening report on January 5; (2) failure to comply with ORS 419B.010 when Appellant did not submit a child abuse report on December 27, and again on January 5; and (3) lack of sound professional judgment when Appellant failed to make a screening report on January 5, as instructed by the screening supervisor. The Board concluded that DHS proved the first charge that Appellant did not follow management expectations when she did not follow the January 5 directive to call the Klamath County screening hotline until January 10, and in doing so showed a lack of sound professional judgment, as alleged in the third charge. However, the Board concluded that DHS did not prove the second charge because ORS 419B.010 did not require mandatory reporting in this situation because a report is required only when a DHS employee has reasonable cause to believe that (1) any child the employee comes in contact with has been abused, or (2) any person the employee comes in contact with has abused a child, and Appellant had no contact with either the DHS's employee's children or husband, and even assuming that she did, Appellant had no "reasonable

cause" to believe that child abuse had occurred. The Board reinstated Appellant and modified her discipline to a letter of reprimand in lieu of a salary reduction.

13.7—Conduct (abusive/negative/interpersonal conflicts) as cause for discipline or removal

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (2) disclosing to subordinates private facts about the employment status of others in the work group, including that he intended to terminate a member of his work group before he informed that employee directly and later asking the work group to find "negative documentation" about the terminated employee, that one subordinate had "issues" with a former employer, that one subordinate had previously been terminated and had obtained her job back after litigation, and that he would not give a subordinate a lead worker position because she was pregnant; and (3) making demeaning remarks about his subordinates to others in the work group, including calling one employee a "whistle blower" who was "not trainable," telling one employee that if she challenged him it "would not go well for her" in the end, and referring to his staff as idiots or "stupid." Appellant had previously been coached twice by his manager for being "flippant" and for minimizing employee concerns. The administrator of Behavioral Health Services testified that Appellant's situation was ultimately "not recoverable," and multiple employees in his workgroup testified that they did not wish to work under him. Board precedent provides that "a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments," quoting *Helfer v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). Consequently, the Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. No "reasonable employer can be expected to retain a manager who offends others, promotes dissension among subordinates, and does not obey orders." *Id* at 24. Under the circumstances, dismissal was appropriate. The Board dismissed the appeal.

13.8—Confidential information, release of

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for, among other things, revealing confidential information about subordinates. Specifically, Appellant disclosed to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave. Appellant also disclosed to subordinates private facts about the employment status of others in the work group. He told his work group that he intended to terminate a member of his work group before he informed that employee directly; later, he asked his subordinates to find "negative documentation" about the terminated employee. He also revealed to subordinates that one subordinate had "issues" with a former employer, that one subordinate had previously been terminated and had obtained her job back after litigation, and that he would not give a subordinate a lead worker position because she was pregnant. (Appellant was also terminated for making demeaning remarks about his subordinates to others in the work group, including calling one employee a "whistle blower," and for failing to timely complete gender dysphoria evaluations on adults-in-custody.) Appellant had previously been coached twice by his manager for being "flippant" and for minimizing employee concerns. The administrator of

Behavioral Health Services testified that Appellant's situation was ultimately "not recoverable," and multiple employees in his work group testified that they did not wish to work under him. One employee reported not feeling comfortable working for Appellant because "he breaks confidentiality between his subordinates." The Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. No "reasonable employer can be expected to retain a manager who offends others, promotes dissension among subordinates, and does not obey orders." *Helfer v. Children's Services Division*, Case No. MA-1-91 at 24 (February 1992). Under the circumstances, dismissal was appropriate. The Board dismissed the appeal.

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

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Among other conduct, Appellant installed unauthorized software on his State laptop. The software included programs that masked his computer's address in order to hide the real computer address of the State-issued laptop from others, and a program that allowed him to control a computer at his home and to pull documents from his home computer data storage to a computer that he was using at work. Appellant argued that it was reasonable for him to believe that all of the programs were acceptable under State information technology policies because the OHA information technology office did not contact him to tell him to remove the programs, noting that he had been so instructed days after he had installed an Adobe Photoshop program on his work computer. The Board concluded that Appellant should have known that it was not reasonable to install this type of software on a State computer; the software Appellant installed was "far beyond limits" imposed by the OHA information technology office. Moreover, it appeared to have no work-related purpose. Appellant did not verify or advise his supervisors or information technology employees before he installed the software. Appellant also bore a greater responsibility for his conduct as a manager who supervised employees subject to the same information technology policy. The Board dismissed the appeal.

13.13—Ethics issues as cause for discipline or removal

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop (including software that masked his computer's address in order to hide the real computer address). With regard to the purchase of laboratory materials and equipment, the Board rejected Appellant's argument that Appellant's manager had authorized Appellant to begin the research that Appellant contended was the reason for the purchases. The Board concluded that the vague expressions of support for Appellant's alleged project were insufficient to authorize a research project in the setting of the laboratory, which is a public health testing facility, not a research laboratory. With

regard to the use of state funds to renew a personal software license, the Board rejected Appellant's argument that he intended to ultimately transfer the license to the lab, and reasoned that, even if true, Appellant did not request permission for this unusual purchase, did not document it as ultimately for the lab, did not inform his supervisor or colleagues of it, and never, in fact, transferred the license to the Lab. The Board dismissed the appeal.

13.18—Language, inappropriate, as cause for discipline or removal

E.A. v. Department of Corrections, Case No. MA-006-19 (September 2020), *recons* (October 2020): Appellant, a correctional lieutenant, appealed his removal from the management service (and dismissal from state service). Appellant was the only manager in the institution during the graveyard shift, and was the officer-in-charge. Appellant had an approximately 90-minute meeting in a closed office with a younger subordinate. Initially, the subordinate expressed distress about her ongoing divorce and a recent death in her family. As the conversation progressed, Appellant and the subordinate discussed the subordinate's libido, the subordinate's relationship with another corrections officer who was her roommate, Appellant's dating life, and Appellant's opinion of "back piercings." During the conversation, Appellant asked questions about the subordinate's roommate, implying that the roommate was being manipulative in order to hasten the transition of the relationship from platonic to romantic. Appellant also complained to the subordinate that another corrections officer had spread rumors about Appellant during Appellant's divorce. Unrelated to the meeting, Appellant also called a male corrections officer by the nickname "Randi," which was the name of an ex-girlfriend of another male corrections officer. The Board concluded that the Department proved this conduct, and that the Department had lost trust and confidence in Appellant as part of the management team. The Department was entitled to expect its managers to model appropriate behavior and appropriate manager-subordinate boundaries, to cultivate trust in the workplace, and not to disparage union-represented classified staff. The Board also explained that Appellant inappropriately modeled to the subordinate that Department managers talk negatively to union-represented employees about other union-represented employees when they are not present, which undermines staff morale, compromises the effectiveness of all DOC management, and creates a lack of trust in the workplace. Appellant's conduct fell short of the Department's expectations, which were high but not arbitrary or unreasonable. The Board dismissed the appeal.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (3) disclosing to subordinates private facts about the employment status of others in the work group, including that he intended to terminate a member of the work group; and (4) making demeaning remarks about his subordinates to others in the work group. With respect to the demeaning remarks, Appellant called one employee a "whistle blower" who was "not trainable," told one employee that if she challenged him it "would not go well for her" in the end, and referred to his staff as idiots or "stupid."

Appellant had previously been coached twice by his manager for being "flippant" and for minimizing employee concerns. The administrator of Behavioral Health Services testified that

Appellant's situation was ultimately "not recoverable," and multiple employees in his work group testified that they did not wish to work under him. Board precedent provides that "a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments," quoting *Helfer v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). Consequently, the Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. No "reasonable employer can be expected to retain a manager who offends others, promotes dissension among subordinates, and does not obey orders." *Id* at 24. Under the circumstances, dismissal was appropriate. The Board dismissed the appeal.

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by, among other things, showing pornographic pictures to subordinates while at work and making lewd and vulgar statements at work to his subordinates about a subordinate with whom he was having a sexual relationship, in violation of the Discrimination and Harassment Free Workplace Policy. The Department established through witness testimony that Appellant referred to the subordinate's menstrual cycle, implying that it affected her emotional state, and also asked one subordinate whether he too had engaged in sexual activity with the subordinate. Appellant also made demeaning comments about the subordinate's physical appearance. Although Appellant disputed the witnesses' accounts, he did not attempt to impeach those witnesses or offer evidence tending to show that his own account was more likely to be accurate. The Board dismissed the appeal.

13.21—Off-duty conduct as cause for discipline or removal

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by engaging in sexual activity with a subordinate at work during work time, showing pornographic photos to subordinates and using demeaning language to refer to the subordinate with whom he was having the relationship, and pressuring the subordinate to report to work on New Year's Eve to help respond to a snowstorm, even though he knew that she had been drinking alcohol. The Department alleged that Appellant's conduct on New Year's Eve, which occurred off-duty at a local tavern, where both Appellant and the subordinate were celebrating with separate groups of friends and family, violated the Maintaining a Professional Workplace Policy and the Principles of Public Service Ethics Policy. The Board concluded that, although it was "a very close call," the Department did not prove that Appellant's conversations with the subordinate on New Year's Eve rose to the level of "badgering" her or unjustifiably invaded her private time with her family. The evidence indicated that Appellant may have been at the tavern for as little as 30 minutes. Further, the Board explained that it assessed Appellant's conduct in the context of the fact that both he and the subordinate happened to be at the tavern when Appellant unexpectedly found himself needing to find, at the last minute, night shift employees willing to work on a holiday. The Board made "some allowance" for the fact that Appellant's judgment may have been affected by the urgency created by the severity of the storm and the fact that it occurred on a holiday when alcohol consumption is common, potentially making it more difficult for Appellant to find an employee to work that night. Further, Appellant and his wife and had previously had a friendly social relationship with the subordinate at another local tavern, so off-duty conversations between Appellant and the subordinate in a bar setting were somewhat more understandable. The Board

concluded that the Department did not prove that Appellant violated either the Maintaining a Professional Workplace Policy or the Principles of Public Service Ethics Policy, and dismissed the appeal.

13.23—Property, misappropriation of

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop (including software that masked his computer's address in order to hide its real computer address). With regard to the purchase of laboratory materials and equipment, the Board rejected the Appellant's argument that Appellant's manager had authorized Appellant to begin the research that justified the purchases. The Board concluded that the vague expressions of support for Appellant's alleged project were insufficient to authorize a research project in the setting of the laboratory, which is a public health testing facility, not a research laboratory. With regard to the use of state funds to renew a personal software license, the Board rejected Appellant's argument that he intended to ultimately transfer the license to the lab, and reasoned that, even if true, Appellant did not request permission for this unusual purchase, did not document this purchase as ultimately for the lab, did not inform his supervisor or colleagues of the purchase, and did not, in fact, transfer the license to the lab. The Board dismissed the appeal.

13.24—Property purchasing rules, violation of

V. v. Oregon Health Authority, Case No. MA-002-19 (February 2020): Appellant, the Virology and Immunology Section Manager (a Principal Executive Manager F position) at the Oregon State Public Health Laboratory, appealed his removal from management service and dismissal from state service. Appellant directed the purchase of approximately $3,656 worth of laboratory materials and equipment for unauthorized research that Appellant conducted in connection with a personal project; applied State resources to work with genetic samples that Appellant had previously obtained from a research project outside the scope of the Public Health Laboratory's work; renewed a $1,000 license for personal software, using state funds, without disclosing the purchase; and installed unauthorized software on his State laptop (including software that masked his computer's address in order to hide its real computer address). With regard to the purchase of laboratory materials and equipment, the Board rejected the Appellant's argument that Appellant's manager had authorized Appellant to begin the research that justified the purchases. The Board concluded that the vague expressions of support for Appellant's alleged project were insufficient to authorize a research project in the setting of the laboratory, which is a public health testing facility, not a research laboratory. With regard to the use of state funds to renew a personal software license, the Board rejected Appellant's argument that he intended to ultimately transfer the license to the lab, and reasoned that, even if true, Appellant did not request permission for this unusual purchase, did not document this purchase as ultimately for the lab, did

not inform his supervisor or colleagues of the purchase, and did not, in fact, transfer the license to the lab. The Board dismissed the appeal.

13.27—Sex-related conduct as cause for discipline or removal

A.D. v. Department of Transportation, Case No. MA-011-17 (March 2019): Appellant, a Principal Executive Manager C, was removed from the management service (with effective dismissal from state service). The Department alleged that Appellant used poor judgment by, among other things, having an intimate sexual relationship with a subordinate employee, which included sexual conduct at work, in violation of the Discrimination and Harassment Free Workplace Policy. Appellant conceded that he engaged in several sexual acts with the subordinate on the Department's property during work time, but argued that it was consensual activity. The Board noted that because the Department proved that Appellant's sexual activity with the subordinate at work constituted poor judgment and violated the Department's expectations, it was not necessary for the Board to decide whether the conduct also violated the Discrimination and Harassment Free Workplace Policy. The Board also rejected the Appellant's argument that he did not use poor judgment because the Department did not prohibit romantic relationships between Department employees. The Board explained that Appellant was not terminated for having a romantic relationship with another employee, but for engaging in sexual activity with a direct subordinate at work. Further, because sexual activity at work is obviously inappropriate, the Department was not required to have a specific rule prohibiting such conduct. The Board dismissed the appeal.

13.34—Work performance, loss of confidence in

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service for being under the influence of alcohol in the office on one occasion. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol. He stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found Appellant's explanations implausible and concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. The Board was not convinced, however, that the Department had lost trust and confidence in Appellant. The Board also rejected the Department's argument that Appellant could no longer be an effective member of the management team; his failure to model good behavior was an isolated incident, he did not embarrass the agency by interacting with the public in an impaired condition, and he did not make any mistakes in his case handling as a result of the impairment. By leaving the workplace as soon as he became aware that his impairment was having an impact, he showed that he at least understood the seriousness of his misconduct, even if he did not admit to it. Further, both his peer and his subordinates indicated that they did not want Appellant to lose his job. The Board concluded that a reasonable employer would not have removed Appellant from the management service without giving him the opportunity to correct his behavior through lesser discipline, given

his 19-year tenure, lack of a record of discipline, and the fact that this was an isolated incident. The Board modified the discipline to a six-month suspension.

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed and terminated for (1) failing to timely complete gender dysphoria evaluations of adults-in-custody; (2) disclosing to a subordinate that another subordinate was out on family leave, had exhausted her FMLA leave, and frequently called in sick when not on leave; (3) disclosing to subordinates private facts about the employment status of others in the work group; and (4) making demeaning remarks about his subordinates to others in the work group, including calling one employee a "whistle blower" who was "not trainable," telling one employee that if she challenged him it "would not go well for her" in the end, and referring to his staff as idiots or "stupid." The administrator of Behavioral Health Services testified that Appellant's situation was ultimately "not recoverable," and multiple employees in his workgroup testified that they did not wish to work under him. Board precedent provides that "a manager can reasonably be expected to show sensitivity to the feelings of other employees and to avoid making patently offensive comments," quoting *Helfer v. Children's Services Division*, Case No. MA-1-91 at 23 (February 1992). The Board concluded that Appellant's colleagues had lost trust and confidence in Appellant. No "reasonable employer can be expected to retain a manager who offends others, promotes dissension among subordinates, and does not obey orders." *Id* at 24. Moreover, with respect to the gender dysphoria evaluations, the Board explained that the state can reasonably expect a management service employee to demonstrate both the willingness and initiative to complete assigned work or notify his or her supervisor if the manager could not do so, citing *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-03-09 at 30 (May 2010), *recons* (June 2010). Under the circumstances, dismissal was appropriate. The Board dismissed the appeal.

13.36—Other

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and delaying discovery. After Appellant submitted information to the district attorney's Brady Review Committee, Appellant was in fact placed on the Brady list. The Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court and training, coaching, and supervising others who appear in court. The Brady listing would be triggered by Appellant's direct or supervised contact with any child welfare matter that would proceed to court, or her supervision of a caseworker who testified in court. Thus, the Brady listing rendered Appellant unable to fully and faithfully perform the duties of her position. Appellant argued that the lack of progressive discipline and her 12 years of prior satisfactory service precluded discipline. The Board concluded that these factors were "irrelevant" because she was not disciplined, but was "removed from her

position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily." The Board dismissed the appeal.

Chapter 15 – Remedies

15.1—Make-whole remedy

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service for being under the influence of alcohol at work on one occasion. The Board concluded that the Department proved that Appellant was under the influence of alcohol at work on the day in question. However, the Board determined that removal from the management service was not objectively reasonable in light of the fact that Appellant was a 19-year employee with no record of disciplinary history and this was an isolated incident. The Board modified the discipline to a six-month suspension and ordered the Department to make Appellant whole for all wages and benefits, less other earnings and benefits, from the date of termination until the date he is offered and accepts, or declines, reemployment to a position comparable to that from which he was removed.

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant appealed her removal from the management service as a Principal Executive Manager C (and dismissal from state service). The Board concluded that Appellant did not meet management's expectations when she delayed complying with a directive to report an allegation about a Department employee, and that her delay constituted a lack of sound professional judgment. The Board also concluded that the Department did not prove that Appellant violated ORS 419B.010, the child abuse reporting statute. The Department did not act as a reasonable employer in dismissing Appellant without progressive discipline. The Board ordered the Department to reinstate Appellant with back pay and benefits, modify Appellant's discipline to a reprimand in lieu of salary reduction, and reissue the disciplinary letter reflecting that discipline.

15.4—Other remedies

S.A. v. Department of Human Services, Case No. MA-004-18 (January 2019), *order granting motion for compliance* (July 2019): Appellant appealed her removal from the management service as a Principal Executive Manager C (and dismissal from state service) with the Department of Human Services (DHS). The Board concluded that Appellant did not meet management's expectations when she delayed complying with a directive to call the Klamath County screening hotline to report an allegation about a Department employee, and that her delay constituted a lack of sound professional judgment. The Board also concluded that the Department did not prove that Appellant violated ORS 419B.010, the child abuse reporting statute. The Board ordered the Department to reinstate Appellant with back pay and benefits, modify Appellant's discipline to a reprimand in lieu of salary reduction, and reissue the disciplinary letter reflecting that discipline. The Department timely reinstated Appellant with back pay and benefits, but the reissued disciplinary letter described the discipline as a reprimand "in lieu of suspension," and included references to the charge that Appellant violated ORS 419B.010. Appellant contested the re-issued disciplinary letter in a new filing, which the Board treated as a motion for compliance. In response, the Department contended that the references in the reissued disciplinary letter to

ORS 419B.010 were necessary to accurately describe the events that resulted in discipline. The Board granted Appellant's motion and agreed that the inclusion of references to ORS 419B.010 in the re-issued disciplinary letter created the incorrect impression that Appellant did not comply with that statute. Because of the significance of the statutory duty to report child abuse to Appellant's career path, the Board ordered the Department to reissue the letter without references to ORS 419B.010 or the statutory duty to report child abuse, and to accurately describe the level of discipline consistently with the Board's order, as a reprimand in lieu of salary reduction.

Chapter 16 – Evidentiary and Other Rulings

16.4—Credibility rulings

E.E. v. Department of Human Services, Case No. MA-003-19 (April 2020): Appellant, a Child Welfare Supervisor, appealed his removal from the management service and dismissal from state service. Multiple employees observed that Appellant appeared to be under the influence of alcohol on one occasion at work. During his fact-finding interview, Appellant explained that he was ill with either a virus or food poisoning. He could not explain why there had been reports that his breath smelled of alcohol and stated that he did not know what the odor was from. Appellant denied that he had consumed alcohol the night before the day in question, adding that he rarely consumed alcohol on weeknights because he received work calls quite often. In contrast, at the pre-removal meeting, Appellant stated that he used hand sanitizer every morning after cleaning up after his dog, and that he had been on a ketogenic diet for some time, which can produce a fruity, metallic odor on the breath. The Board found it implausible that Appellant's use of hand sanitizer before he went to work would explain the odor of alcohol detected by employees hours later. The Board also found that even assuming a ketogenic diet can cause fruity smelling breath, it does not explain why the smell was not mistaken for intoxication on previous occasions. Moreover, Appellant did not offer these explanations at the fact-finding hearing and "his delayed explanations lack credibility."

R.P. v. Department of Corrections, Case No. MA-005-19 (February 2020): Appellant, a Behavioral Health Services Manager, appealed his removal from the management service and dismissal from state service. Appellant was removed from management service and terminated for failing to timely complete gender dysphoria evaluations of adults-in-custody, as well as for various inappropriate comments to and about subordinates. At hearing, Appellant denied the charge related to gender dysphoria evaluations. However, Appellant had clearly and repeatedly admitted earlier that the gender dysphoria evaluations were untimely and that he had not adequately overseen or followed up on them. Consequently, the Board was not persuaded by Appellant's subsequent denials, citing *Morisette v. Children's Services Division*, Case No. 1410 at 22 (March 1983) (manager's prior admission of performance deficiency not undone by his subsequent denial).

16.9—Relevance

J.B. v. Oregon Department of Transportation, Case No. MA-005-20 (April 2021): Appellant, an unrepresented Compliance Specialist 2 in the classified service, appealed his removal from trial service. On the second day of hearing, Appellant provided the ALJ and Respondent with new exhibits submitted in rebuttal to a timeline offered by Respondent during the first day of hearing. Respondent objected to the admission of a timeline of his medical care that

Appellant prepared and to the admission of additional medical records. The exhibits were not relevant. *See Williams v. State of Oregon, Department of Energy*, Case No. MA-14-04 at 3 (January 2005). They were never given to Respondent during Appellant's employment and could not have been part of Respondent's rationale for removing Appellant from trial service. Moreover, the events in some of the exhibits occurred after Appellant's removal.

R.S. v. Department of Human Services, Case No. MA-003-16 (September 2016), *aff'd without opinion*, 289 Or App 822, 412 P3d 1231 (2018): A Child Welfare Supervisor appealed her removal from the management service and dismissal from the classified service. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. Her ability to participate in court proceedings and supervise caseworkers who participated in court proceedings was an essential part of her position. The Benton County District Attorney notified Appellant that he intended to place her on the Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant's lack of credibility and professionalism, such as evidence of false statements and delaying discovery. Appellant submitted information to the district attorney's office's Brady Review Committee, including 113 pages of supporting documents from the relevant Department child welfare files. Appellant was in fact placed on the Brady list. Appellant sought to admit the 113 pages as evidence of her lack of culpability regarding the issues raised by the district attorney. The Department argued that the evidence was irrelevant because the merits of the decision to put Appellant on the Brady list were irrelevant; only the fact of the Brady listing and its scope were relevant. The documents were properly excluded as irrelevant because the Department had no control over the district attorney's decision or its consequences for child welfare cases.

16.12—Timeliness rulings

R.Y. v. Department of Corrections, Case No. MA-001-20 (September 2020): Appellant, a correctional lieutenant, acknowledged that he failed to timely file an appeal of a written reprimand. Appellant argued that the Department did not properly or accurately inform him of his appeal rights because the human resources employee he consulted informed him that (1) his internal Department grievance was untimely because it was more than 30 days from the date of the reprimand, (2) she was new in her position and unsure how to proceed, and (3) he could file an appeal with the Board. However, the human resources employee's statements were not a defense to the lack of timeliness because an employer has "no statutory duty to inform" disciplined employees of the proper appeal procedure. *See Lamb v. Cleveland*, 28 Or App 343, 346, 559 P2d 529, *rev den*, 278 Or 393 (1977). The Board also rejected Appellant's argument that his untimely appeal should be accepted because he did not fully understand his appeal rights. The Board is required by statute and its precedent to strictly enforce the statutory deadline for filing an appeal, even in cases where the management service employee was not aware of the deadline and missed it only by a short period.

A.B. v. Public Utilities Commission, Case No. MA-006-17 (August 2017): On June 26, 2017, Appellant filed an appeal of a removal from trial service in the unrepresented classified service, effective May 25, 2017. Pursuant to ORS 240.560(1) and OAR 115-045-0005, a SPRL appeal must be either postmarked or received by the Board within 30 days after the effective date of the disputed personnel action. The Board dismissed the appeal as untimely.

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