

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-002-14

(MANAGEMENT SERVICE REMOVAL)

LESLIE JONES,)	
)	
Appellant,)	RECOMMENDED RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND PROPOSED ORDER
STATE OF OREGON, COMMISSION FOR)	
THE BLIND,)	
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on February 27 and 28, and March 12, 2014, in Tualatin, Oregon. The record closed on March 26, 2014, following receipt of the parties' post-hearing briefs.

Kevin Keaney, Attorney at Law, Kevin Keaney, P.C., Portland Oregon, represented Appellant.

Lisa M. Umscheid, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

Appellant Leslie Jones appeals her removal from management service as Director of Administrative Services, resulting in her dismissal from state service with the State of Oregon, Commission for the Blind (Commission) effective January 28, 2014.

The issue is:

Did the Commission remove Leslie Jones from management service consistent with ORS 240.570(3)?

For the reasons discussed below, we conclude that Jones's removal from management service violated ORS 240.570(3).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Commission and Jones's Employment Background Facts

1. The Commission is an Oregon state agency with approximately 47 employees. Its purpose is to help blind individuals find work and maintain independence. A seven-member board appointed by the Governor and confirmed by the Senate governs the Commission (Commission Members). The Commission's headquarters are in Portland. It has several other offices throughout the state including Eugene, Salem, and previously Lincoln City. The Commission also operated the Oregon Industries for the Blind (OIB) in Portland until OIB's closure in December 2013.

2. The Commission Members elect an Executive Director. The Executive Director hires managers and employees, including the Directors of: Administrative Services, Business Enterprises, Rehabilitation Services, and the Orientation and Career Center. These Directors report directly to the Executive Director. Until OIB's closure in December 2013, the OIB Director also reported to the Commission Executive Director.

3. The following individuals held management positions at the times relevant to this appeal: Linda Mock (Commission Executive Director until December 2012), Dacia Johnson (started as interim Commission Executive Director in January 2013, elected as Executive Director in March 2013, and previously served as the Director of Rehabilitation Services), Heather Schoenwald (OIB Director in 2012 and 2013), and Desiree Paschall (OIB Director prior to 2012).

4. On October 30, 2006, then Executive Director Mock hired Jones to serve as the Director of Administrative Services. Jones had previously worked for Mercy Corps, serving as their Director for India and their Program Officer for Latin America. She had also served as a Peace Corps volunteer.

5. According to the most recent Director of Administrative Services position description (dated March 1, 2010), the Administrative Service Director's purpose is to "ensure the provision of comprehensive administrative service functions to all agencies. Services include: human resources; budgeting; fiscal administration; planning; information technology; and building operations." (Exh. R-2, at 10.)

6. The position description also listed the following duties of the Administrative Service Director under the categories of budget/fiscal, human resources and operations:

“Budget/Fiscal:

Prepare and implement biennial budgets and Emergency Board requests; attend all meetings and legislative hearings pertaining to the budget. Defend budget in public/legislative hearings and audit;

Assist Administrator in accounting studies and long-range fiscal planning/evaluation;

Consult with the Administrator on fiscal matters pertaining to current practices, laws, and State/Fed regulations;

Act as a budgeting/fiscal liaison with: DAS-BAM [Department of Administrative Services – Budget and Management Division]; DAS-SCD [Department of Administrative Services – State Controllers Division]; and various other State Agencies;

Maintain accounting system in accordance with State requirements;

Ensure adherence to Oregon Accounting Manual;

Ensure adequate reporting and tracking of all budget and fiscal data;

Provide period end reports for Federal and State partners;

Supervise agency purchasing/procurement to ensure adherence to regulations;

Under the Administrator, serves as legislative fiscal coordinator; and

Manage the agency’s property inventory.”

“Human Resources:

Under Administrator, serve as appointing authority;

Serve as liaison with DAS-HRSD[Human Resource Service Division]/LRD [Labor Relations Division];

Serve as internal HR consultant to ensure that all practices are within relevant law and bargaining agreements;

Prepare job announcements/recruitments;

Provide reference checking to verify qualifications;

Oversee/consult with managers on agency performance management program;

Prepare and audit all position descriptions;

Train and coach managers regarding HR issues;

Review all interview questions (participate in/conduct interviews when appropriate);

Assist manager in new employee orientation;

Oversee all employee performance actions. (Discipline, reprimand, promotion);

Prepare agency affirmative action plan/report;

Provide coaching to agency staff regarding employment/performance issues;

Manage employee information in the State's personnel system and in hard-copy via personnel files;

Oversee the preparation and execution of professional services or personal services contracts; and

Manage agency benefits and compensation practices.”

“Operations:

Work with DAS facilities to ensure that facilities are maintained and operated in a manner consistent with all State agencies and within relevant laws/codes;

Project Manage remodeling/building improvements;

Select/approve the selection of all office equipment; and
Ensure that equipment is fully operational.

Ensure leases are executed by DAS in a timely and efficient manner.” (Exh. R-2, at 10-12.)

7. On February 4, 2008, Mock reviewed Jones's annual performance for 2007. Mock wrote that Jones met expectations in all of her essential duties, including her duties to: maintain accounting systems, ensure adequate reporting and tracking of budget and fiscal data, supervise agency purchasing/procurement and payroll functions, manage agency facilities and equipment needs, serve as agency human resources consultant, and manage the agency's information technology functions.

8. For strengths in 2007, Mock noted that Jones learned quickly, was able to manage multiple tasks, and effectively prioritized critical issues to assure they were accomplished in a timely manner. Under areas for improvement, Mock noted that Jones needed to improve her

communication with staff, had failed to follow up on certain issues before they became critical, and had allowed too much management responsibility to fall to staff.

9. On February 17, 2009, Mock reviewed Jones's annual performance for 2008. Mock evaluated Jones in the same essential duty categories as in 2007, with the addition of the duty to develop an agency budget. Mock rated Jones as having exceeded expectations in this area and having met expectations in the remaining categories.

10. For strengths in 2008, Mock again stated that Jones learned quickly, was able to manage multiple tasks, and effectively prioritized critical issues to assure they were accomplished in a timely manner. Under areas for improvement, Mock noted Jones still needed to improve her communication with staff and had continued to fail to follow up on certain issues before they became critical.

11. On March 1, 2010, Mock reviewed Jones's annual performance for 2009. Mock wrote that Jones met expectations in her essential duties, including her duties to: develop an agency budget, maintain accounting systems, supervise agency purchasing/procurement and payroll functions, manage agency facilities and equipment needs, and serve as the agency human resources consultant. Mock stated that Jones needed improvement in the area of managing the agency's information technology functions. Mock stated that Jones exceeded expectations with ensuring adequate reporting and tracking of budget and fiscal data.

12. For strengths in 2009, Mock stated that Jones consistently met deadlines for federal and state reports and brought a valuable and important perspective to the management team. Under areas for improvement, Mock stated that Jones needed to strengthen her management and leadership of the administrative staff given that other staff had complaints about their performance.

13. On March 30, 2011, Mock reviewed Jones's annual performance for 2010. Mock determined that Jones needed improvement with her duties to: develop an agency budget, ensure adequate reporting and tracking of budget and fiscal data, manage the agency information technology functions and manage the administrative department functions. Mock determined that Jones met expectations to: maintain accounting systems, supervise agency purchasing/procurement/payroll, manage agency facility and equipment needs, and serve as the agency human resources consultant.

14. For strengths in 2010, Mock stated that Jones consistently met deadlines for federal and state reports and brought a valuable and important perspective to the management team. Under areas for improvement, Mock stated that Jones needed to pay greater attention to detail and assure that reports are accurate. Mock also stated that Jones needed to strengthen her management and leadership of the administrative staff given that other staff had complaints about their performance.

15. On May 4, 2012, Mock reviewed Jones's annual performance for 2011. Mock determined that Jones needed improvement with her duties to ensure adequate reporting and tracking of budget and fiscal data, and manage the administrative department functions. Mock determined that Jones met expectations to: develop an agency budget, manage the agency information technology functions, maintain accounting systems, supervise agency purchasing/

procurement/payroll, manage agency facility and equipment needs, and serve as the agency human resources consultant.

16. Under strengths in 2011, Mock stated that Jones consistently met deadlines for federal and state reports, brought a valuable and important perspective to the management team, and was able to handle a wide variety of duties that fell within her area of responsibility. Under areas for improvement, Mock stated that Jones needed to pay greater attention to detail and assure that reports are accurate. Mock also stated that Jones needed to strengthen her management and leadership of the administrative staff given that other staff had complaints about their performance.

17. Due to the transition between Mock's retirement and Johnson's assumption of the Executive Director role, Jones did not receive a performance evaluation for 2012.

18. For the fiscal years 2009, 2010, 2011 and 2012, the Commission earned the State Controller's Gold Star Certificate. The State Controller awards the Gold Star Certificate to state agencies that provide accurate and complete fiscal year end information in a timely manner. It was Jones's responsibility to provide the fiscal year information to the State Controller.

19. While at the Commission, Jones successfully completed the following training programs: Criminal Justice Information System Security and Awareness, Hand Portable Fire Extinguisher Class, Fundamentals of Cost Allowability for Federal Grants and Subgrants, Statewide Financial Management System Transaction Inquiry – Part 1, Vouchers Payable, and Encumbrances.

20. The Director of Administrative Services position was originally designated as unclassified executive service. Between 2008 and 2013, it was reclassified to management service along with the other Directors serving under the Executive Director.¹ Johnson was actively involved in that process in her capacity as Director of Rehabilitative Services.

21. Mock retired in December 2012. At that time, Dacia Johnson, who had previously served as Director of Rehabilitation Services, was selected to be the interim Executive Director. In March 2013, the Commission Members elected Johnson as the permanent Executive Director.

22. From January 2013 through October 2013, Johnson and Jones interacted daily in the course of conducting Commission business and in regular management team meetings.

23. Jones did not receive any formal counseling, discipline, warnings or letters of expectations during her time at the Commission from either Mock or Johnson. However, shortly after becoming interim Executive Director, Johnson spoke with Jones about taking a stronger leadership role within her department and making sure that she arrived at 8:00 a.m. if she planned to take a one hour lunch and leave by 5:00 p.m. Jones was receptive to the feedback. Jones complied with Johnson's directive regarding reporting for eight hours each day by stating her workday by 8:00 a.m. each day.

¹ The record shows that the process of reclassifying Jones and the other managers was a lengthy process occurring over several years. (*See Exh. A-66.*) The details of the process of reclassification and the reasons for its long duration are not clear on the record, but this information is not necessary for our analysis.

24. On April 29, 2013, May 21, 2013, and July 31, 2013, Johnson spoke with Jones regarding her failure to either obtain authorization for projects, or complete them satisfactorily. Specifically, Johnson addressed Jones's installation of a credit card machine, lack of care with respect to drafting public record rules, lack of care with a procurement solicitation, and failure to seek clarification regarding a requirement to perform annual financial reviews and audits at OIB.² When Johnson confronted Jones about these issues, Jones accepted the feedback well, took responsibility for her actions, and complied with Johnson's directives to correct problems.

25. On October 7, 2013, Johnson placed Jones on administrative leave, pending a personnel investigation relating to management and oversight duties.

26. After Johnson placed Jones on leave, Jones obtained legal counsel. Counsel for the Commission told Jones's attorney that Jones did not have appeal rights with respect to her possible dismissal because the Director of Administrative Services was in the executive service, not management service. The reason for this assertion was that the State's Position Inventory Control System (PICS) database had an incorrect representation code for Jones and the other department managers under Johnson.

27. On November 22, 2013, Johnson conducted an investigatory meeting with Jones. Counsel for the Commission was present. Jones attempted to explain to Johnson and the Commission Counsel that, if the codes did not reflect that she was in management service, there was an error with the PICS codes. The Commission did not investigate further. On November 29, 2013, the Commission Counsel sent a letter to Jones's attorney, stating that Jones did not have appeal rights because her position was in the executive service.

28. Because Jones understood her position to be in the management service, Jones phoned Patrick Sevigny at DAS. Sevigny is an analyst for the PICS and Orbits Databases. Jones told Sevigny that there appeared to be some problem or inaccuracy, as PICS was not correctly displaying the representation codes for her position. Because Jones was the Commission's Statewide Audit and Budgeting Reporting Section (SABRS) coordinator, Sevigny assumed she was calling in her official capacity.

29. Sevigny researched Jones's representation code concern by consulting the Commission's Permanent Finance Plan and consulting with his supervisor. Sevigny determined that updates to the representation codes that had occurred in the 2011-2013 biennium were not carried over to 2013-2015.

30. Sevigny sent an e-mail to Jones at her Commission address. Sevigny wrote that the representation codes were not correct and needed to be changed. Sevigny asked Jones how she would like to have this accomplished and stated that he would not update anything until he heard from Jones. Jones did not reply because she was on administrative leave. However, because Sevigny determined it was a clear error, he changed the representation codes for Jones and the

² Johnson's discussions with Jones on these issues were included in introductory paragraphs in Jones's dismissal letter; however, they were not the basis of charges against Jones to support the dismissal. Accordingly, we do not find it necessary to discuss them at length.

other Commission Directors who had been reclassified from executive service to management service. Johnson's staff forwarded Sevigny's e-mail to Johnson from Jones's account.

31. On December 16, 2013, Johnson conducted a second investigatory meeting. On December 24, 2013, Johnson issued a Commencement of Pre-Dismissal of State Service Letter to Jones, outlining the reasons for a proposed dismissal, including (1) failure to provide sufficient management oversight to ensure payroll was in conformance with wage and hour law, (2) failure to accurately prepare OIB budget and fiscal information, (3) exercise of poor judgment in renewing an OIB lease, (4) failure to effectively administer OIB human resources, (5) failure to adequately ensure effective project management and oversight, and (6) unauthorized work while on administrative leave.

32. On January 10, 2014, Johnson conducted a pre-dismissal meeting with Jones. Jones was represented by counsel.

33. On January 22, 2014, Johnson sent a letter to Jones removing her from management service and dismissing her from state service effective January 28, 2014. Johnson cited several bases for Jones's dismissal, including: (1) failure to provide sufficient management oversight to ensure payroll was in conformance with wage and hour law, (2) failure to accurately prepare OIB budget and fiscal information, (3) exercise of poor judgment in renewing an OIB lease, (4) failure to effectively administer OIB human resources, (5) failure to adequately ensure effective project management and oversight, and (6) unauthorized work while on administrative leave.

OIB Background and Problems

34. OIB occupied a separate facility on Ankeny Street in Portland. At OIB's facility, blind and developmentally disabled individuals performed piece-rate work and engaged in recreational activities. OIB clients also operated a coffee and snack shop called the Short Stop in a government office building. OIB was funded by government funds, Short Stop, the companies that commissioned the piece-rate work (such as Lockwood), and the clients' support service brokerages (Brokerage).

35. OIB paid the Commission \$5,530 each month for administrative services. These services included: invoicing companies for piece-rate work, processing cash receivables, reconciling cash deposits from Short Stop, purchasing goods and services via purchase orders from the OIB Director, processing payroll and health insurance, budgeting with DAS and the legislature, high level/expenditure and cash flow management, leasing, landscaping and maintaining the building, state motor pool vehicle support, IT support, and DHS background checks. The Commission also provided HR support. However, OIB kept all personnel records and initiated all personnel actions for OIB employees.

36. OIB's Director reported directly to the Commission's Executive Director. Until mid-2012, the OIB Director was Desiree Paschall.

37. In 2011, Paschall became ill and was frequently out of the office. In September 2012, Mock and Jones hired Heather Schoenwald as the OIB Director, but did not remove Paschall.

Schoenwald's previous experience and education was primarily in the field of mental health counseling services. Schoenwald did not have any training or experience in management, human resources, budgeting, financial reporting, or state regulations for serving the developmentally disabled. As a result, Schoenwald did not meet the state regulatory requirements for holding the OIB Director position. Subsequently, Mock applied for and received a variance to allow Schoenwald to hold the position as long as she had mentoring from the Commission Executive Director.

38. The Commission did not provide Schoenwald with any specific training for the OIB Director position. Paschall still reported to the OIB facility when her health permitted. However, instead of providing Schoenwald with training, Paschall directed open hostility toward her.

39. When Schoenwald needed assistance with performing her job or wanted to request additional staff, she would approach Jones. Jones provided general assistance but always told Schoenwald that the Commission did not have funds for additional OIB staff.

40. Starting in 2008, OIB began gradually losing clients. This trend continued through 2013 and had a negative impact on OIB's budget.

41. In 2012, Jones was preparing a financial report and noticed that OIB was paying two severely disabled clients substantially higher wages than other piece-rate clients. After further investigation, Jones determined that Paschall and Mary Orozco, the primary administrator under Paschall, had committed time card fraud with respect to the overpaid individuals. The Commission terminated Paschall and Orozco.

42. OIB staff conducted background checks for new OIB employees. In 2012, Schoenwald learned that because of OIB's work with the developmentally disabled, the state required employee background checks to be conducted by the Department of Human Services (DHS). OIB's previous failure to perform DHS background checks placed OIB at risk of losing its operating license. Jones agreed to help Schoenwald establish this process. Jones followed the process for becoming certified in DHS background checks, obtained fingerprints and applications for OIB employees, and submitted them to DHS for processing. Jones and Schoenwald, however, did not place OIB employees on leave pending the completion of their criminal background checks.

43. On November 30, 2012, Johnson spoke with Sherry Davis, an employee of the Multnomah County Developmental Disabilities Services (MCDD). The MCDD provided regulatory oversight and operation certification to OIB. Davis told Johnson that she understood that the Commission may want to close OIB, and asked if poor conditions and regulatory non-compliance at the facility reflected this intent. Johnson responded that it was the Commission's intent to try to run OIB as an effective and efficient program. On December 12, 2012, Johnson spoke with a contractor specializing in licensing, who told her that OIB was at risk of losing MCDD certification, largely due to employees continuing to work without sufficient background checks, which would require closing the program.

44. Johnson reported these conversations in an e-mail to Mock and Jones on December 14, 2012. Subsequently, Jones sent an e-mail to Mock, stating “I should have conferred with you on the situation since I was aware that the investigator said the program would be shut down. I apologize for this. I was busily getting [the background checks] done and didn’t recall this had been said. I will be more careful in the future and also ensure the checks are done before OIB staff are hired.” (Exh. R-12, at 1.)

45. On February 25, 2013, Jennifer Sroufe, an MCDD investigator, sent an e-mail to her supervisor, Shari Davis. In this e-mail, Sroufe outlined the results of an ongoing abuse investigation at OIB. Sroufe wrote that Schoenwald lacked understanding of running a day program and submitting mandatory incident reports. Sroufe also wrote that Schoenwald had disciplined staff for sending incident reports and some reports had not been submitted. Sroufe also outlined serious concerns arising from anonymous concerns by OIB staff, including:

“Lack of supervision to OIB clients, OIB staff stealing psychotropic medication from clients, inappropriate discussions regarding client hygiene at OIB, participants/clients taking other clients to the restroom and/or assisting them outside to their ride, OIB staff accepting money or food from clients who offer it, OIB staff missing medication administration, OIB clients/participants falling on wet floors, inappropriate behavior/touching by OIB staff trying to scare clients/participants.” (Exh. R-13, at 3.)

46. Davis forwarded the e-mail to Johnson on February 26, 2013. Johnson forwarded it to Jones on that same day.

47. The Commission’s 2013-2015 biennial budget increased funding for OIB and added a full time equivalent (FTE) position. All previous positions had been temporary. The reason for the added FTE was that in order to be covered by the state insurance pool, OIB had to be managed by someone subject to the rules applicable to FTE’s.

48. In April 2013, the Oregon Governor’s office issued Executive Order 13-04, which directed state agencies to transition the developmentally disabled individuals they serve from sheltered work (as done by OIB) to community based employment.

49. In May 2013, the Commission sent out a notice of informal solicitation to find someone to perform a limited qualitative review of services provided to OIB clients and evaluate OIB’s compliance with regulations, administrative rules and state law. The solicitation requested an evaluation of OIB’s readiness and ability to comply with Executive Order 13-04.

50. In summer 2013, Johnson hired independent contractors Molly Holsapple and Janet Straw (OIB Evaluators). The OIB Evaluators primarily focused on OIB’s compliance with Oregon Administrative Rules, Chapter 411, Divisions 323 and 324, which require agencies providing services to the developmentally disabled to: (1) recruit, hire, supervise, and train qualified staff; (2) provide person-centered employment and community inclusion services; (3) develop and implement operating policies and procedures required for managing an agency; and (4) comply with state and federal law.

51. After completing their analysis in September 2013, the OIB Evaluators found several areas where compliance was lacking: (1) no OIB staff had current signed job descriptions with clear duties; (2) employment application procedures did not meet requirements; (3) there was no system for documenting annual staff in-service training; (4) there was a lack of documentation of checking references during hiring; (5) some staff did not have background checks completed until after starting work; (6) OIB lacked a system to track and assure required staff certifications; (7) OIB lacked a system for annual performance reviews; (8) OIB lacked follow-up documentation on staff abuse allegations; and (9) OIB lacked updated staff employment records.

52. Based on the compliance concerns, the OIB Evaluators recommended that OIB: (1) develop a check sheet that lists all the hiring requirements; (2) develop an electronic tickler system for when staff needs recertification in CPR, first aid, and Oregon Intervention Systems; (3) organize staff files more effectively; and (4) develop a system to track content, scheduling and provisions of training requirements.

53. The Evaluators described the respective duties of Jones and the OIB Director as follows:

- “• OIB Executive Director (ED) – responsible for the day to day operation of the program, the provision of individualized services and supports, program administration including maintain community relations and personnel management.
- OCB Director of Administrative Services (DAS) responsible for providing human resource, budgeting, fiscal management, payment and billing support to [the] Commission for the Blind programs including OIB.” (Exh. R-23, at 18.)

OIB Sub-minimum Wage Certificate Charge

54. Because OIB clients performed piece-rate work, they often earned less than hourly minimum wage. Since OIB clients earned less than minimum wage, OIB was required to obtain and annually renew a Certificate Authorizing Special Minimum Wage Rates under Section 14(c) of the Fair Labor Standards Act from the United States Department of Labor (sub-minimum wage certificate).

55. Jones had never been told to complete or ensure completion of OIB’s sub-minimum wage certificate and was not aware it existed. Former Executive Assistant Matthew Goldman submitted the 2003 and 2005 sub-minimum wage certificate applications. Former OIB Director Paschall completed and submitted the 2007 and 2009 sub-minimum wage certificate applications for OIB.³

³ The record does not specifically show who signed the sub-minimum wage certificate application in 2004, 2008, and prior to 2003. However, the record does not show that the Director of Administrative services was ever responsible for completing and submitting it.

56. The Commission did not submit any sub-minimum wage certificate applications for the years 2011 and 2012.

57. In July 2013, the OIB Evaluators determined that OIB had failed to submit sub-minimum wage applications and receive certifications since 2010. Johnson asked Jones and Schoenwald about it, and both of them stated that they were not familiar with the certification requirement or application documents. Johnson directed Schoenwald to submit an application for the current year and determine whether retroactive applications could be filed for previous years.

58. Schoenwald and Johnson determined that the Commission could not obtain sub-minimum wage certificates for prior years. Therefore, the Commission retroactively paid OIB clients a total of \$144,494.43 in back wages to bring their pay up to minimum wage requirements.

OIB Lease Charge

59. The Commission leased OIB's facility at the Ankeny Street location on a biennial basis. Approximately one year before the lease's expiration, DAS would send Commission management a lease renewal inquiry form (LRI) to inquire if the lease should be renewed and if there should be any changes to the lease terms.

60. After the Commission returned the LRI to DAS, DAS staff would prepare the lease and Department of Justice (DOJ) attorneys would review it for legal sufficiency. Once the DOJ reviewed it, DAS would return it to the Commission staff for signature.

61. Jones frequently sent the OIB lease draft to Johnson in her role as Director of Rehabilitative Services to determine if she had any concerns before Jones obtained Mock's signature.

62. In 2010, the Commission closed its Lincoln City office despite a continued lease obligation. The Commission was unable to abrogate its obligations under the lease because the lease terms only permitted termination with 120 days notice in the event that legislative funding was insufficient (a non-appropriations clause).

63. For the 2007-2009 term, Mock signed the OIB facility lease.

64. On June 13, 2012, DAS sent LRIs to Jones for the Commission offices in Eugene and the OIB facility in Portland. The OIB lease was set to expire on June 30, 2013. On June 25, 2012, Mock signed the OIB LRI, telling DAS to renew the lease with its current terms, for up to two years. Mock designated Jones as the Commission's contact person.

65. On January 22, 2013, Liz Beaty, Leasing and Property Agent for DAS, wrote to Jones and stated she did not have the LRI for the OIB lease. Jones requested another copy of the LRI. Brenda Schnee, DAS leasing agent, sent Jones another LRI form.⁴

⁴ The record shows that Mock signed the LRI on June 25, 2012 but on January 22, 2013, DAS reported not having received it. The record is not clear on whether Jones sent the LRI before January 2013.

66. On January 25, 2013, Jones asked Johnson if it was okay for her to sign the lease for the Commission's Eugene office with its current terms. Johnson responded: "I am fine with renewing the lease. Thanks for checking." (Exh. R-21, at 1.)

67. On April 22, 2013, the DOJ opened a file for reviewing the OIB lease. The lease contained the same non-appropriation clause as the prior Lincoln City lease. DOJ attorneys did not identify any legal concerns with the non-appropriation clause or any other language.

68. On April 24, 2013, Beaty sent Jones two drafts of the OIB lease, the second reflecting an addition of terms permitting renewal without execution of a new lease.

69. On May 10, 2013, Jones signed the 2013-2015 OIB facility lease. Jones did not tell Johnson that she had done so.

70. During the period of January 2013 through May 2013, Jones, Johnson, Schoenwald and Commission Account Technician II Doris Patke engaged in discussions about interior improvements to the OIB building, including painting, window treatments, floor waxing, and making the doors compliant with the Americans with Disabilities Act (ADA). These conversations included what the building owner would allow under the lease and whether the building owner or the Commission would bear the costs. Subsequently, Johnson requested that the Commission allocate approximately \$7,000 in donated funds for the improvements.

71. In August 2013, Johnson discovered that Jones had signed the lease renewal, shortly after the OIB Evaluators' discovery of the sub-minimum wage certificate lapse. Johnson discussed it with Jones, who explained that Mock had provided authority for the lease renewal and that DOJ attorneys had reviewed it for legal sufficiency and not found any problems.

72. OIB closed in December 2013. The closure was due to a combination of OIB's ongoing financial and regulatory problems, the large financial cost of the sub-minimum wage certificate lapse and the Governor's directive to move developmentally disabled clients from sheltered work to community based vocation.

73. The ongoing lease obligation at the former OIB facility has been costly to the Commission.

OIB Budget Charges

74. In early June 2013, Johnson requested that Jones prepare a typical monthly budget for OIB. On June 4, 2013, Jones sent Johnson an April 2013 OIB budget-to-actuals calculation that reflected a monthly loss of \$6,059.00. Jones had selected April 2013 as a sample month because it was the most recent budget-to-actuals document that had been closed out. In the budgetary analysis, Jones included a significant charge from the Attorney General's office that had been paid in April. Jones also included a \$5,000 average for OIB's revenue received other than the Express Payments⁵ revenue average. Jones provided this average because she did not have

⁵ The parties did not explain what funds were included in the Express Payments revenue and why it is separated from other forms of revenue. However, that is not relevant for our analysis here.

actual revenue information available to her at that time. Jones labeled this average as “Brokerage/short stop average.” (Exh. R-16, at 3.)

75. After reviewing the April 2013 budget Jones prepared, Johnson asked Jones how it was possible that OIB could operate at such a deficit without Johnson previously becoming aware of it. Jones responded that the Attorney General expenses were abnormally high for April 2013 due to some atypical activity. Johnson also asked Jones whether the revenue amounts were correct.

76. Jones sent Johnson an e-mail, stating “Attached is the updated budget with the AG line fixed. It will take some time to gather the Short Stop, Brokerage and Lockwood revenue information, but I wanted to get you something you could work with in the meantime. I will send you that information as soon as I can get it.” (Exh. R-16 at 4.) Jones attached a revised budget, reducing the Attorney General expenses by \$2,412, which resulted in an apparent OIB monthly loss of \$3,647.00.

77. Subsequently, accounts receivable staff Jim Bowers provided Jones with OIB’s actual revenue for April 2013. On June 7, 2013, Jones provided Johnson with a new budget report, reflecting the actual revenue from Brokerage (\$1,965), Lockwood (\$5,213) and Shortstop (\$1,687). Because the actual revenue amount was higher than Jones’s previous average estimate, this budget showed OIB earning a profit of \$218.00 in April 2013.

78. In early July, the OIB Evaluators requested Commission staff to provide budgetary information regarding the Short Stop concession stand. On July 15, 2013, Jones e-mailed Short Stop financial information to the OIB Evaluators, reflecting revenue and shortfall for six months. In order to obtain this information, Jones reviewed more detailed financial information about Short Stop than what she would normally review in her role as Administrative Services Director. In her cover e-mail, Jones explained that some information would be forthcoming from Schoenwald and that other relevant information could be clarified by OIB employees.

79. Between July 20 and August 12, 2013, Holsapple, Johnson, and Schoenwald exchanged information and developed Short Stop budgetary information, copying Johnson on all e-mails exchanged. On August 12, Holsapple sent Jones, Johnson, and Schoenwald an e-mail explaining some errors in previous accounting practices and the potential legal liability in having one employee volunteer. Holsapple also outlined the reasons that Short Stop was operating at an increasing loss and needed to be either improved or closed.

80. Johnson had also directly asked Schoenwald to prepare a financial report regarding the Short Stop budget. At some point, Johnson asked Jones why her budget differed from Schoenwald’s. In order to respond to Schoenwald, Jones reviewed Schoenwald’s report and made corrections to it.

81. Johnson did not tell Jones that she believed Jones had failed to meet a performance expectation with respect to preparing the OIB and Short Stop budgets until her pre-dismissal letter.

Commission-Based Charges

82. In 2013, Commission managers decided that the Commission headquarters front desk should have a panic alarm for the safety of employees. Jones procured the installation of the panic alarm which was completed by July 9, 2013, when Jones was on vacation. On that day, Angel Hale, the new Director of Rehabilitation Services, sent an e-mail to Jones asking whether the safety committee had already discussed panic alarm procedures or planned to in their next meeting.

83. Jones was also on vacation during the third week of July, totaling two weeks of leave during July 2013. Jones did not develop a procedure for the panic alarm because she was out of the office and thought the front office manager was the most appropriate person to develop the protocol. On July 23, 2013, Richard Turner, Training Center Director, sent an e-mail to all managers including Johnson, asking about the panic alarm procedure. Johnson responded, stating that it would be placed on the next manager's meeting agenda.

84. Jones prepared a draft of the panic alarm procedure. After receiving feedback from other managers, Jones modified her first draft and, on August 9, 2013, sent an e-mail to all headquarters staff outlining the procedures in the event of a panic alarm engagement.

85. The Commission's headquarters building has a security alarm system. On her computer, Jones maintained the document discussing employee protocols in the event the security alarm system engaged. However, it was not contained on a shared network drive. One employee lives near the office and the alarm service company had his phone number as a contact if the alarm was triggered after hours. In November 2013, after Jones was placed on administrative leave, this employee asked Systems Administrator Michael Kimsey about the protocol he should follow if the alarm company phoned him about the alarm. Kimsey responded that he had asked Jones for the information but she had not provided it.

86. The Commission has had a historical practice of storing cooperative agreements and personal service contracts in a file cabinet located behind the desk of the executive assistant. When a new contract is placed in the cabinet, a coversheet is updated to reflect its filing.

87. Additionally, after a 2011 audit and a serious contract issue resulted in the termination of another employee, Jones created a contract summary sheet where she logged all contracts, including personal service contracts, and subsequently reviewed them with Commission members. On this contract summary sheet, Jones listed the physical location of the contracts, including those with the executive assistant.

88. Jones executed a professional services contract with Willamette Consulting on March 7, 2013. She did not file the contract with the other professional services contracts that were maintained by Johnson's executive secretary. Jones kept the contract at her desk, because she was actively working on it.

89. In 2011, an audit revealed that the Commission was not properly tracking employee issuance and usage of Mobile Communication Devices (MCDs or cell phones). To resolve this,

Jones used the State's policy for MCD usage to develop a user agreement and had employees who currently used cell phones sign the user agreements. However, as employees were subsequently issued MCD's, there was no protocol to ensure that these employees signed agreements.

90. On August 15, 2013, human resources personnel for DAS sent Jones and Johnson a draft organizational chart to review along with some questions. Jones responded by answering DAS's questions, stating that the chart looked great, and requesting that it be made accessible to blind users. Johnson responded that the organizational chart was not accurate and asked Jones to review the errors Johnson identified. Jones asked Johnson if Johnson wanted the chart to reflect the budgetary or the human resource lines of supervision. After receiving clarification, Jones then sent Johnson's corrections to DAS, stating that Johnson's corrections were accurate.

91. In October 2012, Jones was in placed in charge of conducting quarterly safety committee meetings. Jones conducted safety committee meetings in January and April 2013. Jones did not solicit topics from members before any of these meetings. Before the April meeting, Jones sent committee members the minutes from the January meeting. Jones also attempted to schedule a meeting for October 2013, but it did not occur because Johnson had placed Jones on administrative leave.

92. The Commission has historically conducted an annual all-staff meeting in December. Administrative staff typically held a departmental meeting after the all-staff meeting. Both meetings occurred in December 2012. Subsequently, the Commission decided to change the all-staff meeting to a summer event and the first meeting occurred in July 2013.

93. Prior to the all-staff meeting, Johnson asked Jones about her plans for the meeting and Jones stated that she planned on a round robin format. Johnson provided Jones with suggestions about ways to engage discussion regarding new management strategies, including a creating a specific and detailed agenda.⁶

94. Jones did not create a specific agenda that was distributed in advance. Instead, she had a three item agenda – discussing a new management initiative, a round robin relate with a process divulge and each staff giving an update. Jones believed it was one of the most productive all-staff meetings she had conducted.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. Jones's removal from management service violated ORS 240.570(3).

⁶ Johnson testified that she directed Jones to create a detailed agenda, suggesting it was insubordination when Jones failed to do so. However, Johnson's personal notes taken at the time reflect that she "suggested" a detailed agenda to Jones, and Jones's testimony reflects that she interpreted it as a suggestion.

Removal from Management Service

ORS 240.570(3) provides that a “management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” The Commission has the burden of proving that its discipline was consistent with ORS 240.570(3). See OAR 115-045-0030(6) and *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). Here, the Commission meets its burden if this Board determines, under all of the circumstances, that the removal decision was “objectively reasonable.” *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011); *Morisette v. Children’s Division*, Case No. 1410 at 23 (March 1983). The employer’s burden of justifying a removal is relatively minor. *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22-23 (July 2010).

Applying this burden, we review management service disciplinary appeals using a two-step process. *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-03-09 at 27 (May 2010), *recons*, (June 2010). First, we determine if the employer proved the charges that are the basis of the discipline. *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 30 (July 2006), *recons den*, (September 2006). The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15. Second, if the employer proved some of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Greenwood* at 30.

Below, we conclude that the Commission proved some of the charges, but not others. Specifically, the Commission proved that Jones exercised poor judgment in renewing the lease for the OIB facility without first consulting with Johnson. Additionally, the Commission proved some of the charges regarding Jones’s failure to effectively manage projects, such as not obtaining MCD agreements when new cell phones were issued, not providing meaningful feedback on an organizational chart, and not making security alarm information available. However, as explained below, we determine that the Commission did not prove that the other charges were properly brought against Jones, as she did not have clearly defined responsibilities with respect to the personnel management of OIB. Considering the charges the Commission did prove, we conclude that Jones’s removal from management service violated ORS 240.570(3) as the Commission did not apply the principals of progressive discipline and good faith.

EFFECTIVE PROJECT MANAGEMENT

The Commission makes seven specific charges under its general charge that Jones failed to adequately ensure effective project management and provide oversight. Based on the discussion below, we determine that the Commission fully proved three of these charges and partially proved one. However, we conclude that the Commission failed to prove the remaining three charges. Our reasoning on each of the seven charges is discussed below.

First, the Commission charges that Jones failed to implement procedures for the panic alarm after it was installed. Jones provided a reasonable explanation for this in that: (1) she was

out of the office when it was installed, and part of the month thereafter; (2) she thought the front office manager would be a more appropriate individual to develop the procedures; and (3) after it became clear that it was expected of her, Jones completed the procedure after receiving feedback from other managers. Given Jones's explanation and the lack of any evidence from the Commission showing that developing the procedure was clearly Jones's responsibility, we conclude that the Commission did not prove this charge.

Second, the Commission charges that there was a lack of available and documented procedures in the event that the security alarm triggered. Jones stored this information on her computer, but not on a shared network drive. Jones argued that Mike Kimsey, Systems Administrator, was the employee in charge of maintaining and sharing that information. The Commission produced an e-mail by Kimsey stating that he asked Jones for it, but that she did not provide it. Jones testified that she would have produced it if asked. The record is not clear on whether Kimsey asked Jones for the information. However, since it was Kimsey's responsibility to maintain and distribute the information, but it was in Jones's possession, he should not have had to request it from Jones. Accordingly, we conclude that the Commission proved this charge.

Third, the Commission charges that Jones failed to properly catalog a personal service contract with Willamette Consulting by logging and storing it with the executive secretary's personal service contracts. Johnson did not know about the agreement until she found the contract in Jones's desk after placing her on administrative leave. Jones responded that it was in her desk because she was actively working on it when Johnson placed her on administrative leave. Jones also asserts that she catalogued that contract in her contract summary sheet, but the Commission did not produce the most recent version that would include it.

The Commission had an unwritten policy to store and catalogue cooperative agreements and personal service contracts with the executive assistant. Other contracts were stored in other areas. Starting in 2011, Jones tracked the location of all contracts on her contract summary sheet, which was stored on a shared network drive. Jones testified that she added the Willamette Consulting contract to her contract summary sheet. The Commission produced a copy of her contract summary sheet, but Jones testified that it did not produce her most recent version. Therefore, the record is clear that Jones did not add the Willamette Consulting to the executive assistant's contract file, and is not clear as to whether she was tracking the contract on her summary sheet. However, given that Jones had a separate method for tracking contracts, we conclude that the Commission did not meet its burden to establish that adding the contract to the executive assistant's files and list was a clear failure of Jones's duties.

Fourth, the Commission charges that Jones failed to have employees who were issued MCDs or cell phones after 2011 sign user agreements. The Commission has proven that, while Jones did have employees sign agreements in 2011, there was no ongoing agreement requirement for employees who were subsequently issued an MCD. Additionally, while the Commission did not present details, Johnson testified that issues arose with an employee misusing a cell phone when there was no agreement in place. Accordingly, the Commission has proven this charge.

Fifth, the Commission charges that Jones was negligent in not providing meaningful feedback regarding an organizational chart sent to her for review by a Department of

Administrative Services employee. Jones admits that this was a valid criticism. She explained that she had only looked at the format, not the content, of the organizational chart. Jones acknowledged that she should have been more thorough. Therefore, we conclude that the Commission proved this charge.

Sixth, the Commission charges that Jones failed to take the initiative to plan a meaningful Administrative Services Team meeting in August 2013. The Commission asserts that Johnson directed Jones to develop a detailed agenda and hold a substantive meeting. Jones did not create an agenda in advance, beyond stating that the meeting would consist of staff providing updates and receiving information through a round robin and a process divulge. The record shows that the only agenda in the record is one that was developed by someone else after the meeting. Jones denies that Johnson directed her to develop a specific agenda. Jones argues Johnson made suggestions and states that she conducted a good and productive meeting despite a limited agenda. Jones and Johnson presented conflicting testimony regarding their conversations before the meeting. Johnson's supervisor notes reflect she had "suggestions" for Jones. Neither witness came across as more credible than the other on this issue, and this charge appears to therefore be based on miscommunication. Given that the burden is on the Commission, we conclude the Commission did not to prove this charge.

Seventh, the Commission charges that Jones failed to hold and document quarterly safety committee meetings. Jones was given responsibility for the meetings in September 2012. She held safety committee meetings in January and April 2013, and attempted to schedule another one in October 2013 before Johnson placed her on administrative leave. The record shows that Jones did not make an agenda for the January meeting, but did draft minutes and a brief agenda for the April 2013 meeting. The Commission also charges that Jones did not solicit topics for agendas from agency staff, which Jones does not deny. Given the lack of factual dispute between the parties on that part of the charge, we determine the Commission proved it to that extent. However, by conducting safety committee meetings in January and April and attempting to schedule one in October 2013, Jones was following an approximate quarterly schedule. Therefore, we conclude that the Commission partially proved these charges; however, we note that Jones's failure to create agendas and solicit topics from agency staff was an insignificant error that does not seem to have had any negative consequences.

CONTACT WITH DAS EMPLOYEE

The Commission charged that Jones contacted Patrick Sevigny regarding the PICS codes while on administrative leave, thereby engaging in a prohibited work activity. Specifically, the Commission charged:

"On the assumption that you were calling him in your official capacity as an OCB employee, Mr. Sevigny changed your representation code from unclassified service to management service in entries he made to the PICS system... You contacted Ms. Savarro during the late morning on December 5, 2013... You did inform her that you were on administrative leave. By the time of your contact with Ms. Savarro, however, Mr. Sevigny had already changed your representation code from unclassified (executive) service to management service." (Exh. R-1, page 14.)

Jones testified that her position (along with the other Commission Director positions under the Executive Director) was reclassified from executive service to management service. Jones raised this with Johnson and Commission counsel on November 22, 2013, yet no further action or research was taken by them. The Commission continued to assert that Jones was not a management service employee in a November 29, 2013 letter despite Johnson's participation in the reclassification. This confused and concerned Jones, as the process for reclassifying her position had been an extensive one in which she was involved.

In order to obtain clarification, Jones phoned Sevigny. Jones testified that she told Sevigny that she was on administrative leave when she phoned him on December 3, 2013. Sevigny testified that he does not recall Jones telling him she was on administrative leave. The fact that Sevigny responded to Jones's Commission e-mail address suggests that she did not tell him. However, it is undisputed that Jones was forthcoming with Sevigny's supervisor, Savarro, which would indicate that she also likely would have been upfront with Sevigny. Ultimately, however, we do not find the issue of whether Jones told Sevigny she was on administrative leave to be dispositive on our decision as to whether the Commission proved that Jones engaged in prohibited work activity. The testimony of both Jones and Sevigny establishes that Jones did not direct Sevigny to change her classification code in the PICS system. Rather, Sevigny updated the classification code for Jones and the other Commission Directors after verifying that there had been a clear error and confirming with his supervisor that this was the appropriate action.

The Commission also asserts that, as Jones was the Commission's SABRS coordinator, her call to Sevigny to point out the error constituted unauthorized work while she was on administrative leave. The Commission further asserts that Jones should have worked through her attorney to resolve the matter. Jones testified, however, her attempts to raise this issue had been disregarded by counsel and the Commission. Further, Jones testified that she phoned to get clarification related to her correct classification, and was not engaging in work on Commission's behalf. Therefore, Jones was attempting to understand or correct a specific clerical error affecting her ability to exercise the statutorily established rights of a management service employee facing discipline or dismissal. Finally, Sevigny testified that Jones did not instruct him to make any changes. Rather, after Jones raised the issue, Sevigny recognized a clear error that needed to be corrected. Accordingly, he made the change despite no further contact with Jones. Therefore, the Commission did not prove that Jones engaged in inappropriate work activity.

OIB HUMAN RESOURCES

One of the Commission's charges against Jones was that she failed to effectively administer human resources for the OIB. The OIB Evaluators identified several issues with human resource management: (1) no OIB staff had current signed job descriptions with clear duties; (2) employment application procedures did not meet requirements; (3) there was no system for documenting annual staff in-service; (4) there was a lack of documentation of checking references during hiring; (5) background checks were not performed on some staff prior to employment; (6) OIB lacked a system to track and assure required staff certifications; (7) OIB lacked a system for annual performance reviews; (8) OIB lacked follow-up documentation on staff abuse allegations; and (9) OIB lacked updated staff employment records. Johnson copied findings (1), (3), (4), (5), (7), and (9) into Jones's dismissal letter. Johnson further stated that Jones said at a December 16,

2013 meeting that she did not: (1) monitor or review OIB employee files; (2) ensure that job descriptions were current; (3) review training files; (4) participate in hiring decisions; or (5) participate in reference checking and criminal background investigations as discussed. We conclude that the Commission did not satisfy the burden of proof for these charges, given the limited evidence presented and that the record does not show that these tasks fell within Jones's duties.

The Commission did not offer any evidence for these charges beyond the conclusions made by the OIB Evaluators. The Commission did not produce any documents upon which the OIB Evaluators relied and did not present their testimony. Therefore, we are not able to assess the reliability of these conclusions. The Commission appears to have relied on Jones's statements regarding these charges as admissions of failure. However, the record indicates that Jones was more likely explaining that those duties had typically fallen to OIB management, and that was the reason she had not performed them.

Overall, the record shows that there was a lack of clear delineation between Jones's duties and the duties of OIB managers. OIB paid \$5,530 to the Commission for administrative services. These services included: invoicing companies for piece-rate work, processing cash receivables, reconciling cash deposits from Short Stop, purchasing goods and services via purchase orders from OIB Director, processing payroll and health insurance, and budgeting with DAS and the legislature. These services also included financial analysis, high level/expenditure and cash flow management, leasing, landscaping and maintaining the building, state motor pool vehicle support, IT support, and DHS background checks. The Commission also provided personnel management. Specifically, the Commission conducted personnel actions in the database and provided HR support.

However, OIB management retained personnel records, maintained files, and initiated personnel actions, including hiring and firing. OIB staff also maintained responsibility for completing and submitting the sub-minimum wage certificate application along with background checks for OIB employees. Jones's duties included serving as internal HR consultant to ensure that all practices were within relevant law and bargaining agreements. The OIB Evaluators described the respective duties as the OIB Executive Director being responsible for OIB personnel management and the Director of Administrative Services being responsible for providing human resource support to all programs, including OIB. One example of each of them fulfilling these roles is that Jones assisted with background checks once Schoenwald learned that OIB had not been performing them properly using the DHS system.

The failure with the OIB background checks, along with all other aspects of human resource management, occurred because there were no clear expectations and delineations as to which duties were considered "personnel management" (the OIB Director's responsibility) and which duties were considered "human resource support" (the Director of Administrative Services's responsibility). When Schoenwald became OIB Director, OIB was already facing financial and regulatory difficulties. Schoenwald lacked any prior experience in management, human resources, budgeting, and the financial and regulatory requirements for a program such as OIB. Schoenwald was not provided any training in these areas and received open hostility, rather than assistance, from her predecessor. Accordingly, she was unaware of many of the requirements necessary for

the OIB program to function and did not receive proper mentoring or training. Because the OIB Director had historically handled compliance with these requirements, Jones was also similarly unaware of them. Given the substantial financial and regulatory problems that OIB suffered through 2012 and 2013, Jones and Schoenwald needed clear supervisory support and direction to understand their respective responsibilities. However, management did not provide the necessary support, likely due largely to the lack of continuity in the Executive Director position.

We note additionally that there is no evidence in the record that the same type of human resource concerns occurred with non-OIB Commission employees. This further supports Jones's contention that the failed OIB personnel duties were not primarily her responsibility or not clearly delegated to her. Accordingly, while the Commission produced evidence of human resource failings at OIB, it did not prove that these functions fell clearly within Jones's duties. Thus, the Commission has not met its burden to prove this charge.

SUB-MINIMUM WAGE CERTIFICATE

The Commission charges Jones with failure to provide sufficient management oversight of OIB's payroll. The Commission's specific charge is that Jones failed to ensure that OIB had an appropriate sub-minimum wage certificate in effect from 2011 to 2013. OIB's failure to successfully apply for sub-minimum wage certificates for the years 2011, 2012 and 2013, cost OIB \$144,494.43 in back wages that had to be paid to clients. Paying this significant sum made the long struggling OIB no longer financially viable and it closed. Therefore, this was a significant error and the Commission proved that it occurred. The Commission argues that Jones should have become aware of the sub-minimum wage certificate when investigating the OIB time card fraud that occurred in 2012. However, the Commission did not present any evidence that this investigation would have brought to Jones's attention that a specific certificate was required to pay sub-minimum wage or that it had not been obtained since 2010.

As with the other human resource regulatory issues, however, this responsibility had historically fallen on the OIB Director and not Jones. Jones was not aware of the sub-minimum wage certificate requirements prior to the discovery that it had not been obtained for three years. Therefore, the failure to obtain sub-minimum wage certificates was caused by the combination of: (1) Paschall's failure to file the certification application after 2010; (2) an inexperienced, unsupported, and untrained OIB Director being hired as her successor; (3) a lack of Commission leadership continuity and mentoring; (4) a lack of proper delineation and assignment of duties between Jones and the OIB Director; and (5) Jones's failure to carefully monitor the human resource requirements of OIB. However, the record does not indicate that anyone except Jones received any disciplinary action for the lapse when she was removed and dismissed. Given that it was not historically her responsibility to apply for the sub-minimum wage certificate, and given that she was not the supervisor of the OIB Director, the Commission has not met its burden to establish this as an appropriate charge against Jones, justifying her dismissal.

OIB BUDGET AND FISCAL INFORMATION

The Commission charges Jones with failure to accurately prepare OIB budget and fiscal information. Specifically, in June 2013, Johnson asked Jones to prepare a budget analysis of a

typical month at OIB. Jones provided Johnson with OIB's budget for April. This budget reflected that OIB lost \$6,059 that month. The reasons for the significant shortfall were that OIB had spent a significant amount on Attorney General services in April and Jones had provided an average for some revenue sources that turned out to be lower than the actual revenue for April. Johnson asked Jones about the shortfall and Jones provided the corrected information. In July, the OIB Evaluators asked Jones to prepare budgetary information for the Short Stop concession stand. Jones, Schoenwald, and Holsapple worked together to create an accurate budget. Holsapple ultimately provided both Jones and Schoenwald with guidance and proper accounting practice advice.

Jones argues that the OIB financial information for April 2013 was accurate, just that she used an average for revenue and the full amount for the Attorney General expenses. Jones also argues that she understood the Short Stop budget information requests to be an interactive process where she would provide the information available to her, and make adjustments based on feedback from Johnson, Schoenwald, and the OIB Evaluators. The Commission asserts that it was entitled to rely on Jones to accurately track and monitor the financial condition of OIB and Short Stop without the necessity of an interactive process. We conclude that while the Commission proved that Jones initially provided Johnson and Holsapple with inexact financial information regarding OIB and Short Stop, it did not sufficiently prove that Jones failed to meet clear expectations as far as accurate preparation of OIB budget/fiscal information.

Jones also provided valid reasoning for the figures in her initial April 2013 OIB budget. Specifically, Jones explained that she provided a revenue average because she did not have the actuals information available at the time. Her budget document reflected that it was an average as she labeled it "Brokerage/short stop average." Further, Jones explained that while the Attorney General expenses were not typical that month, they were an accurate reflection of costs paid in April 2013. It is certainly understandable that Johnson would have been alarmed by what appeared to be a substantial monthly loss for OIB; however, she was able to obtain a ready explanation for it from Jones. Further, the Commission has not provided any indication of negative consequences that arose from Jones providing the initial OIB figures.

Jones has also shown that she normally reviewed high-level information for Short Stop, but in July 2013, she was asked to provide more in-depth information showing monthly receivables and costs. Jones provided the information she had at the time and she explained that some information would still be needed from OIB staff and Schoenwald. Schoenwald also developed a formula, and Jones corrected some of her calculations. Ultimately, Holsapple corrected the calculation methods used by both Jones and Schoenwald and provided them with future direction on analyzing the Short Stop's finances.

We find Jones's claim that she provided her Short Stop budgetary information as a start to an interactive process credible. The Commission did not provide evidence of what Johnson specifically had asked of Jones. Jones's cover e-mail suggests that she anticipated that the information she provided would allow for a complete and accurate analysis after further feedback. Accordingly, we believe Jones's testimony that she understood she was providing preliminary information as an interactive process.

RENEWING THE OIB LEASE

The Commission charged Jones with poor judgment in renewing the lease for the OIB facility on Ankeny Street in Portland. Unlike the human resources functions, responsibility for OIB's lease renewal was a clear responsibility of Jones's. The Commission asserts that Jones "secretly" executed the lease in May 2013, despite knowledge of OIB's severe on-going financial and regulatory problems. With OIB's closure in December 2013, the ongoing lease obligation has been costly to the Commission. The Commission explains that Johnson had been considering progressive discipline against Jones based on the other charges, but upon discovering the lease renewal, Johnson determined that Jones's removal and dismissal was the appropriate action. Jones argues that she was fulfilling her duty to ensure leases were renewed. The parties' arguments focus largely on whether Jones should have known that there was a possibility that OIB may have to close.

The Commission also asserts that Jones should have identified a concern with the OIB lease's termination/non-appropriation clause, because the Commission was not able to terminate its lease in Lincoln City, which contained the same clause. However, the Commission did not present specific evidence regarding the legal implications of the non-appropriation clause in either the Lincoln City lease or the OIB lease. Further, the Commission did not offer any evidence regarding what alternative termination terms might have been acceptable to the building owner. Further, as Jones argues, DOJ attorneys reviewed the entire lease for legal sufficiency, and did not find any issues with the non-appropriation clause. Therefore, we do not weigh this factor in the Commission's favor. Additionally, Jones testified that she was aware of the Governor's Executive Order regarding closing sheltered workshops, but that the Commission referenced it in the solicitation for the OIB's Evaluators, which indicated that OIB was planning to adapt its services to comply, rather than close. We find Jones's interpretation reasonable.

Although we do not weigh all factors in the Commission's favor, we conclude that the Commission did present convincing evidence to show that Jones would have been aware that OIB was facing significant financial and regulatory problems. Specifically, Johnson forwarded e-mails to Jones on December 14, 2012 and February 26, 2013, outlining serious licensing and regulatory concerns at OIB. Additionally, in her role as Administrative Services Director, Jones would have been aware of OIB's increasing revenue losses. Further, Jones sent an e-mail to Mock acknowledging that she was aware that the violation of allowing employees to work before DHS background checks had been completed was so significant that the MCDD may revoke OIB's authority to operate. The record also shows, however, that there was no indication of the Commission voluntarily closing OIB and, in that same e-mail string, Johnson had reported to county licensing officials that it was the Commission's intent to try to run OIB as an effective and efficient program.

Jones argues that it was her responsibility to renew leases, Mock had signed the LRI, and Jones acted on that authority. The Commission responds that Mock had provided that authority in June 2012, before the severity of OIB's programs were clear. In light of all these factors, the Commission asserts Jones should have asked Johnson or Schoenwald about renewing the lease. Jones responds that she would have had no reason to think that OIB might be closing given

improvements to the OIB facility that occurred January 2013 through May 2013, including painting, window treatments, floor waxing, and making the doors compliant with the ADA.

The record shows that when Jones signed the OIB lease in May 2013, there were no discussions of a voluntary OIB closure, but there were discussions of problems and potential closure by outside entities. Therefore, we do not conclude that Jones should have known that OIB would close. However, given these issues along with other factors, we are flummoxed by Jones's decision to renew the lease without consulting Johnson. The record shows that in the past it was Mock, not Jones, who signed the lease renewals. Jones has not offered any reasonable explanation for her decision to sign the lease herself instead of presenting it to Johnson. Further, Jones's decision to sign it without consulting Johnson is further perplexing given that she did ask Johnson about signing the lease renewal for the Commission's Eugene office. While it may have been Jones's responsibility to renew leases, her past practice was to have the Executive Director sign the OIB lease, and often even ran it by Johnson in her capacity as Director of Rehabilitative Services. Therefore, we determine that the Commission proved its charge that Jones exercised poor judgment in her renewal of the OIB lease and we will next analyze whether the level of discipline was appropriate in light of this charge along with the others the Commission has proven.

Level of Discipline

Because we have concluded that the Commission proved some of the charges against Jones, we next determine whether the Commission acted as an objectively reasonable employer when it removed Jones from management service for being unable or unwilling to fully and faithfully perform the duties of her position and dismissed her from state service. We have defined a reasonable employer as one that disciplines in good faith and for cause and clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Mabe v. Department of Corrections*, Case No. MA-09-09 (July 2010); *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989). A reasonable employer also "imposes sanctions that are proportionate to the offense; considers the employee's length of service and service record; and applies the principles of progressive discipline." *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001). See also *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). However, a reasonable employer may not be required to provide progressive discipline "where an employee's offense is gross or the employee's behavior probably will not be improved through progressive measures." *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994). Finally, reasonable employers "administer discipline in a timely fashion." *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 at 19 (March 1994).

The Commission did not prove all charges against Jones. However, the Commission proved some of the charges regarding Jones's failure to effectively manage projects, such as not executing MCD agreements when new cell phones were issued, not providing meaningful feedback on an organizational chart, and not making security alarm protocol information available. Additionally, the Commission proved that Jones exercised poor judgment in renewing the lease for the OIB facility without first consulting with Johnson. The Commission asserts that, while it was previously contemplating disciplinary action against Jones, once it discovered the signed OIB

lease, it determined that removal and dismissal was appropriate. The Commission did not issue any formal discipline against Jones prior to that time for the other charges. For the reasons discussed below, we conclude that the Commission did not act as a reasonable employer in removing Jones from management service and dismissing her from state service.

1. Performance Expectations

The Commission did not clearly define all performance expectations, express those expectations to Jones, and inform her when they were not being met with respect to the proven charges in this case. This is not to say that the Commission did not communicate some performance expectations. Specifically, the record shows that Johnson spoke with Jones about taking a more proactive and strong leadership role in her department. Johnson also spoke with Jones about some specific concerns, including Jones's authorization of a credit card machine project, lack of care in drafting public records rules, lack of care with a procurement solicitation, and failure to clarify confusion regarding the recent requirement to perform annual financial reviews and audits at OIB. Additionally, in Jones's 2007-2011 performance evaluations, Mock had noted some areas that needed improvement. These concerns were somewhat similar to the charges, in that they showed lack of thoroughness. However, none of the concerns raised by either Mock or Johnson were the specific bases of charges in the removal and dismissal letter. Since these were not charged, the Commission did not prove that they occurred or that Jones had specific performance expectations associated with them. Further, at the time of Jones's removal and dismissal in January 2014, she had not received a performance evaluation since May 2012. Accordingly, Jones was not given an opportunity to improve her performance in light of the charged failures.

Additionally, although the Commission did not prove the charges with respect to OIB personnel management, these were also the Commission's bases of Jones's removal. And as discussed above, Mock and Johnson did not provide Jones and Schoenwald with clear direction regarding their respective duties. As a result, many obligations fell through the cracks between Schoenwald's duty to provide personnel management at OIB and Jones's duty to provide human resources support. Specific direction on their respective duties from their shared supervisors could have provided Jones and Schoenwald with more clearly defined performance expectations. Accordingly, we conclude that Jones received some general guidance on performance expectations, and was warned in areas that needed improvement such as better follow through and more attention to detail. However, these expectations were not directly related to the charges forming the bases of Jones's removal and dismissal, and she did not have any warning of possible pending dismissal.

2. Progressive Discipline

The Commission did not apply the principals of progressive discipline because it imposed sanctions that were disproportionate to the offense, considering Jones's length of service and service record. The Commission has proven the charge that it asserts was the basis of the decision to remove and dismiss Jones. The Commission has proven some other charges as well. However, we conclude these do not justify removal and dismissal.

Jones was employed by the Commission for approximately seven years. During her first five years, she received performance evaluations that reflected some areas of needed improvement, but largely showed that she met or exceeded most expectations. Jones did not receive any formal discipline during her time at the Commission. Accordingly, Jones had a good and somewhat lengthy service record with the Commission.

When Johnson confronted Jones with errors she had made and provided directives based on those errors, Jones readily accepted the feedback and complied. The Commission did not present any evidence that Jones ever responded with defensiveness, hostility or untruthfulness when confronted with failures to meet expectations. Accordingly, the Commission has not shown that Jones's performance could not be improved through progressive measures.

Jones's failure to consult with Johnson before renewing the OIB lease had substantial financial consequences, as it caused the Commission to have an ongoing legal obligation to pay rent to a facility that it no longer used. Additionally, it was inconsistent with Jones's previous practices with leases. Further, she was aware of OIB's severe ongoing problems and she has not offered any explanation for her signing. Therefore, it was a serious charge. However, the evidence also shows that Jones would not have known that OIB would be closing six months later; and OIB did need to have access to a facility in which to operate as of July 1, 2013. Additionally, while the Commission attempts to characterize the lease signature as a covert and deceptive act, the record does not support a finding that Jones deliberately concealed it from Johnson. Rather, given some of Jones's other errors, it is more likely that she neglected to check with Johnson before signing it. Further, the record does not show any significant consequences from the other proven charges, such as Jones's failure to execute MCD agreements when new cell phones were issued, failure to provide meaningful feedback on an organizational chart, and failure to make security alarm information available.

Taking all of the above factors into consideration, we conclude that discipline against Jones was certainly appropriate. Although not malicious, one of her errors was serious given its costly consequences. Further, the other proven charges show a lack of thoroughness. However, considering Jones's previous service record and receptivity to feedback and direction, the Commission has not shown that progressive measures could not improve Jones's performance.

3. Good Faith/For Cause

We also conclude that the Commission did not bring all the charges against Jones in good faith. Specifically, with respect to OIB-related charges (other than the lease), it is clear that OIB failed after a period of severe distress. The responsibility for OIB's failure appears to fall on several shoulders. Paschall committed time card fraud and allowed OIB to decline into financial and regulatory distress. Schoenwald did not have the necessary training, experience, and support to rehabilitate it. Jones did not provide sufficient oversight to OIB human resource functions to compensate for the OIB Director failures. Mock and Johnson also played a significant role, as they were the supervisors of Paschall, Schoenwald and Jones, and did not provide them with the needed guidance, direction, and mentoring. Yet the record indicates Jones was the only employee who was disciplined; and her discipline was severe.

Similarly, the extensiveness of the Commission's charges, many of which the Commission did not prove, indicates that Jones's actions were not viewed with objectivity. For example, she was charged with failure to provide accurate budgetary information when she had provided accurate figures (with the exception of an average that had been labeled as such). Jones was also charged with failing to ensure the completion and submission of documents that had always been another manager's responsibility. Further, Jones was charged with performing unauthorized work while on administrative leave because she called Sevigny. The Commission characterizes this action as underhanded and asserts that Jones should have worked through counsel to resolve the issue of the incorrect PICS code. However, Jones had already attempted to raise the issue with Johnson and counsel and had been ignored. This is particularly troubling given that the Commission attempted to deny Jones's right to appeal her pending dismissal, and Johnson herself had been involved in the reclassification of Commission managers. Therefore, we conclude that the Commission did not bring all charges in good faith.


Remedy

Based on our findings, we will order that Jones be reinstated to her former position and be made whole with respect to back pay and benefits. The termination is modified to a suspension of 30 days without pay. This sanction is commensurate with the seriousness of Jones's errors and poor judgment, yet takes into account principals of progressive discipline and good faith.

PROPOSED ORDER

The Commission is ordered to reinstate Jones to her former position and make her whole with respect to back pay and benefits, and to modify her discipline to a suspension for a period of 30 days without pay.

SIGNED AND ISSUED this 3rd day of June, 2014.



Julie D. Reading
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections to this Board. (The "date of file objections" means the date the objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-045-0045-0040; and 115-070-0055.)