



Kate Brown, Governor



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The Oregon Health Authority submits the following information related to questions raised during the public hearing for SB 26 on January 24, 2019.

Definition of Substantiation

Oregon Administrative Rules establish the procedures for reporting, investigating and resolving allegations of patient abuse in the Oregon State Hospitals. OAR 407-0405 – 0495. “Substantiated” means that the preponderance of evidence establishes the abuse occurred.” OAR 407-045-0415 (28). As required by the mandatory reporting laws applicable to people with disabilities, the Office of Training, Investigations and Safety (OTIS) receives reports of alleged patient abuse by state hospital staff and conducts investigations to make abuse findings. OAR 407-045-0405.

Why the Bill Relates Only to Abuse of a Patient/Client

The bill seeks to amend ORS 179.390, relating to the Appointment, Suspension, Removal and Salaries of Assistants, Officers and Employees of State Institutions, relating exclusively to Oregon Health Authority state hospitals and Department of Corrections facilities. The changes to statute under SB 26 only relate to Oregon State Hospital facilities.

OHA seeks this change as it specifically relates to patient abuse as that is the context in which the issue arose. To elaborate, if abuse leads to termination, an employee may challenge the termination by submitting the matter to arbitration. In the case that gave rise to this legislative request, the arbitrator ordered the employee to be reinstated even though there was clear and convincing evidence that the employee’s conduct constituted physical abuse. In such a case, OHA can, and did, petition the Employment Relations Board (“ERB”) to review the arbitration award. The ERB can only find an arbitration award unenforceable in certain circumstances, including if it violates public policy. In the referred to case, OHA argued that the award violated public policy (citing – among other things -- ORS 243.706 related to public employment public policy requirements). However, the ERB found that although there are various statutes and rules establishing a clearly defined public policy against the physical abuse of patients, there are no statutes about employment or reinstatement, and thus OHA had no grounds for the argument that the arbitration award was unenforceable.

Without a statute that clearly prohibits the reinstatement of an employee who failed to comply with the standards of conduct defining and governing physical abuse of patients, OHA does not have clear legal support to overturn an arbitrator’s finding of reinstatement, even after abuse of a patient has been established.

Applicability of Amendments On or After Effective Date

OHA proposes that amendments to ORS 179.390 apply only to incidents of physical and sexual abuse occurring on or after the effective date to ensure fairness. The abuse investigation process has changed over the years and to proceed with a retroactive application of this standard would give rise to due process and fairness concerns.