

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-14-11

(MANAGEMENT SERVICE REMOVAL)

LUIS V. RODRIGUEZ,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
STATE OF OREGON,)	CONCLUSIONS OF LAW,
DEPARTMENT OF HUMAN SERVICES,)	AND ORDER
)	
Respondent.)	
<hr/>		

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on June 7, 2012, after a hearing held on February 7 and 8, 2012. The record closed on February 29, 2012, following receipt of the parties' post-hearing briefs.

Luis V. Rodriguez, Appellant, Salem, Oregon, appeared *pro se*.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

Appellant Luis V. Rodriguez appeals his removal from management service on August 23, 2011, as an Investigator 3 in the Department of Human Services' Office of Investigations and Training.

The issue is:

Was Appellant's removal from management service consistent with ORS 240.570(3)?¹

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDING OF FACTS

1. The Office of Investigations and Training (OIT) is part of the Department of Human Services (Department), and charged with investigating allegations of abuse or neglect of children, as well as adults with mental illness and developmental disabilities. The OIT has investigational oversight over children placed in approximately 40 state, county, or private facilities, including children's residential care agencies, day treatment programs, therapeutic boarding schools, foster care homes, and outdoor youth programs, which are collectively referred to as Children's Care Providers (CCP).

2. To fulfill its mission, the OIT partners with state or county agencies who receive reports of alleged abuse from hotlines, therapists, or medical personnel. Those entities are required by state statutes to forward relevant information to the OIT, where a screener undertakes an initial evaluation. ORS 419B.005 through 419B.050 and OAR 407-045-0800 through 407-045-0980.

3. If OIT receives a report of child abuse from a referring source, it is required to conduct a site visit with the child within 24 hours, contact local law enforcement or medical personnel, if appropriate, and coordinate with CCP staff and the facility to ensure the child's safety. ORS 419B.015 and 419B.017; OAR 407-045-0860(1).

4. ORS 419B.023 and ORS 419B.024, commonly referred to as Karly's Law, impose heightened requirements on personnel who receive reports of suspicious physical injuries to children. Suspicious physical injuries are defined in part as "extensive bruising or abrasions on any part of the body" and "bruising, swelling or abrasions on the head, neck or face." ORS 419B.023(1)(b)(B) and (C). The Department's administrative rules

¹The letter cites ORS 240.555 as authority for the action, but the language used in the letter is taken from ORS 240.570(3), which allows for removal from management service for employees without prior classified service. ORS 240.570(3) is the appropriate statute and the error was corrected prior to hearing by the Department. Rodriguez did not have prior classified service, so his removal from management was tantamount to dismissal from state service.

define maltreatment of a child to include “willful infliction of pain or injury, hitting, kicking, scratching, pinching, choking, spanking, pushing, slapping, twisting of head, arms, or legs, tripping, and the use of unnecessary force.” OAR 407-045-0820(12). The OIT investigator is required to document the injury as soon as possible, preserve evidence through photographs, and to arrange for an examination to be performed by appropriate medical personnel within 48 hours. ORS 419B.023 states:

“Duties of person conducting investigation under ORS 419B.020.

“ * * * * *

“(2) If a person conducting an investigation under ORS 419B.020 observes a child who has suffered suspicious physical injury and the person is certain or has a reasonable suspicion that the injury is or may be the result of abuse, the person shall, in accordance with the protocols and procedures of the county multidisciplinary child abuse team described in ORS 418.747:

“(a) Immediately photograph or cause to have photographed the suspicious physical injuries in accordance with ORS 419B.028; and

“(b) Ensure that a designated medical professional conducts a medical assessment within 48 hours, or sooner if dictated by the child’s medical needs.

“(3) The requirement of subsection (2) of this section shall apply:

“(a) Each time suspicious physical injury is observed by Department of Human Services or law enforcement personnel:

“(A) During the investigation of a new allegation of abuse * * *.”

5. During regular business hours, a case may be reassigned to another investigator for follow-up if the report originates from a distant part of the state and there is another investigator available in that area. OIT Investigator Richard Keck, who lives in Ashland, has been asked to follow-up on investigations in southern Oregon to avoid requiring a Salem-based investigator having to travel hundreds of miles.

6. Reports of child abuse that come in after regular business hours, on weekends, or holidays, are screened by a rotating list of OIT investigators who are on call twenty-four hours a day for up to a week at a time. Investigators who perform this

on-call screener function receive additional compensation and may receive overtime pay if they conduct an investigation during one of these periods. It is not the OIT's practice to reassign cases that come in after hours because the on-call investigator is generally expected to handle the matter.

7. When an on-call investigator receives a report of child abuse after regular business hours, Department procedures require the investigator to interview the child within 24 hours; take photographs of any injuries with a state-issued camera; write an assessment; identify the perpetrators, if possible; and work with the facility or foster home to prepare a safety plan. OAR 407-045-0870(3); 407-045-0880. OIT Director Eva Kutas testified that 24 hours is the maximum amount of time given to respond, but the expectation and practice is that if a substantiated complaint is received, immediate action will be taken by the on-call investigator.

8. Safety plans are generated by the facility where the child is housed and specify what steps it will take to ensure the child's safety. Because time may be of the essence, the safety plan may be communicated verbally to the screener or investigator, but a written plan must be submitted shortly thereafter.

9. In August 2006, Rodriguez was hired to work in the Department's Child Welfare Division. His employment background included work as a juvenile counselor and in law enforcement. In September 2007, he transferred to the OIT as an Investigator 3, a confidential, management-level position that investigates child abuse allegations.

10. The duties of an Investigator 3 include report writing, photographing and securing evidence, interviewing witnesses, and occasional overnight travel to other parts of the state. OIT employees sign acknowledgments stating that violating Department rules or policies may result in discipline up to dismissal. In October 2010, Rodriguez transferred to the adult section of OIT as a screener.

11. Rodriguez received training in investigative techniques relating to CCP cases, including Karly's Law, in December 2007, May 2008, and December 2008. Elements of that training included photographic documentation of injuries, identifying suspicious or unobserved injuries, interviewing the child and witnesses, and time frames for taking certain actions. All of the information was compiled in a single binder and provided to Rodriguez for his reference. While employed in the CCP section of OIT, Rodriguez was assigned 13 child abuse investigations.

12. During his tenure in the CCP section of OIT, Rodriguez received performance appraisals that either met or were below expectations. There were many positive comments about his work, but the areas that needed improvement included

report writing and following through on his investigations. In a memo to OIT's Deputy Director Margaret Semple, summarizing Rodriguez's performance over an 18-month period, his supervisor wrote

"As OSH screener, Luis has continued to have problems with accuracy, writing, grammar, attention to detail, and bias. Luis has sent the wrong letter to an agency, failed to correctly identify patients, created documents that are inaccurate, failed to obtain necessary information in order to make a proper screening decision, and failed to document his work."

Facts Giving Rise to Rodriguez's Dismissal

13. On the evening of Friday, May 27, 2011,² the start of the Memorial Day weekend, Rodriguez was working as OIT's on-call CCP investigator in Salem. He received a call from the Child Welfare Hotline in Multnomah County with a report of a 12-year-old with facial bruises and red friction marks on his arms. The child was living at a Portland foster facility called Give Us This Day (GUTD), whose Executive Director is Mary Holden, PhD. The Hotline operator who received the call deemed it sufficiently serious to contact OIT that evening, rather than wait until regular business hours.

14. Rodriguez took no action that evening. At around 11:00 the next morning, approximately 17 hours after he received the initial report, Rodriguez called another investigator, EW, who lived next door to GUTD. EW was not on duty at the time and informed Rodriguez that he did not perform CCP on-call work, he did not have his state-issued camera with him, and he was not permitted to enter the GUTD premises.³ Nevertheless, Rodriguez, who did not supervise EW, prevailed upon him to meet with the child outside the facility.⁴

15. EW observed red friction marks on the child's arms and a facial bruise with swelling the size of a golf ball, which the boy said was the result of GUTD staff picking him up and throwing him against a door or wall. EW took notes and photos of the

²Unless noted otherwise, all remaining dates occurred in 2011.

³The executive director of GUTD had complained that EW was observing them and was uncomfortable having him respond to calls there. Rodriguez denied knowing that EW was prohibited by the OIT from entering GUTD, but EW credibly testified that he told Rodriguez that information during the telephone call.

⁴Rodriguez testified he did not want to incur overtime by driving to Portland, but this appears to be an after-the-fact justification since overtime is permitted by the Department for these investigations.

child's injuries with his personal Blackberry telephone and called Rodriguez to say that "it did not look good," and the case required a full investigation. EW ended his involvement at that point.⁵

16. Rodriguez did not ask EW for his notes or photographs, he did not contact law enforcement or medical personnel, he did not contact the child, and he did not travel to Portland. Rodriguez called OIT's regular screener, Aubrey Roach, at home to relay what occurred and to obtain Dr. Holden's cell phone number. Roach reminded him that EW was not permitted to go over to GUTD and that Rodriguez needed to obtain a safety plan as soon as possible.

17. Rodriguez reached Dr. Holden later that day to request a safety plan, but did not follow through to find out what it was or if she sent it via facsimile to the OIT. Dr. Holden called Rodriguez back to complain about EW being at GUTD. Rodriguez took no further action for the remainder of the holiday weekend, during which time he received no other job-related calls.

18. When CCP screener Roach returned to work on Tuesday, May 31, she asked Rodriguez for the safety plan but he did not know whether it had been sent to the office or the status of the child. Roach contacted Dr. Holden and received a written safety plan from her later that day, which was nearly four days after the initial hotline referral, and three days after EW confirmed the child's injuries.

19. When OIT staff met later that day to discuss the situation, Rodriguez made the comment "Holden can kiss my ass," which was a reference to Dr. Holden's complaints about EW being on GUTD property.

20. On June 17, an investigatory interview was conducted by OIT managers at which Rodriguez acknowledged that he did not know what the safety plan was for this child and did not know how or if the child was kept safe over the weekend.

21. On July 5, Rodriguez was stationed at home with pay. On July 12, he was sent a Notice of Potential Dismissal from State Service that summarized the facts surrounding this incident and setting a meeting for July 26, at which he appeared.

22. On August 23, the Department sent Rodriguez a Notice of Dismissal based on his inability or unwillingness to fully and faithfully perform the duties of his position satisfactorily.

⁵EW was reprimanded for his actions that day.

23. In a later, written statement, Rodriguez volunteered that he did not follow procedures but claimed that it was not unusual for CCP investigators to delegate investigations to other personnel.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. Rodriguez's removal from management service did not violate ORS 240.570(3).

DISCUSSION

Standards for Decision

By letter dated August 23, 2011, the Department removed Rodriguez from state service for failing to follow state statutes, Departmental administrative rules, and office procedures in his role as an on-call investigator for the OIT. ORS 240.570(3) provides that after completion of trial service, an employee may be removed from management service only "if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22 (July 2010). The employer bears the burden of proving that its action was lawful. OAR 115-045-0030(6). It meets that burden of proof if this Board determines, under all of the circumstances, the Department's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260-61, 628 P2d 410 (1981). A reasonable employer is "one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross." *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).

The Department must establish that its action was taken "in good faith for cause." *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992). If the Department meets its burden, we then apply the reasonable employer standard to determine whether the circumstances of the dismissal justify the lack of progressive discipline. *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994).

Basis for the Department's Decision

The Department dismissed Rodriguez for failing to follow state statutes and administrative rules regarding a report of an injured child at a foster facility. The Department's investigation showed that after receiving a report from the Multnomah County Hotline of physical injuries to the child, he took no action for approximately 17 hours. Rather than drive to Portland from Salem, which was less than an hour's drive, Rodriguez prevailed upon an off-duty investigator who lived next door to GUTD to contact and photograph the child's injuries. Rodriguez was aware the other investigator did not perform CCP screenings, was not permitted to enter the GUTD premises, and did not have his state-issued camera with him. Nevertheless, after receiving verification of the child's head injuries, Rodriguez did not contact law enforcement or appropriate medical personnel, he did not contact the child, he did not travel to Portland, and he did not ensure that a safety plan was in place. Other than to speak to the GUTD director, he took no further action until returning to work on Tuesday, May 31.

Rodriguez argues that the training he received regarding child safety measures under Karly's Law was inadequate and that the OIT allowed on-call investigators to refer reports to other investigators who lived closer to the child's location. He also argues that given his employment record, dismissal from state service was too harsh a discipline.

Training

Rodriguez faults the Department for inadequately training him to respond to CCP child abuse reports, but the evidence shows he received training on CCP screening and investigations, including Karly's Law, on three occasions. He was provided a comprehensive training manual from those training sessions that included the relevant statutes, administrative rules, procedures, contact numbers, addresses, and resources. He also had access to managers and other OIT investigators if he needed support or guidance. In fact, Rodriguez contacted the OIT screener, Aubrey Roach, at home on a Saturday when he needed a contact number for GUTD, and she advised him to obtain a safety plan as soon as possible, something he did not do. The record supports a finding that Rodriguez was sufficiently trained in his duties to either know, or know how to find out, what steps to take. His failure to exercise these options was a dereliction of duty.

The OIT's Practice Regarding Referrals to Other Investigators

Rodriguez received the call in Salem and argues that he was following OIT practice and saving money when he asked a Portland investigator to interview and photograph the child rather than drive there himself. The consistent practice, however, was that asking another investigator to initiate contact with a child only occurred during

regular work hours when there was sufficient backup and when great distances were involved. It was not the practice for on-call investigators to contact off-duty personnel when the alleged report was generated less than an hour's driving distance away. Rodriguez's request was especially inappropriate in a case where Rodriguez was told by the other investigator that he was prohibited from entering the facility, did not perform CCP on-call screening, and did not have his state-issued camera with him. The weight of credible evidence demonstrates that Rodriguez was not following standard or acceptable OIT practice when he asked another investigator to perform his duties. Based on these findings, we conclude the Department met its burden of proving the charges.

Appropriateness of the Discipline

In considering the appropriate level of discipline, we first determine whether "the level of discipline imposed is objectively reasonable in light of all of the circumstances." *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008). In applying the "objectively reasonable" standard to management discipline cases, this Board allows an employer to hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Helper v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992).

An important consideration in this Board's review of a removal from management service "is the extent to which the employer's trust and confidence in the employee have been harmed and, therefore, the extent to which the employee's capacity to act as a member of the 'management team' has been compromised." *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984). In other dismissal cases, this Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the action(s), and the likelihood of repeated misconduct. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001).

Rodriguez argues that given his length of service and his otherwise discipline-free employment history, the Department should have exercised progressive discipline rather than dismiss him from management service. The Department, however, views his failure to follow state law as a gross violation of his duties.

ORS 419B.023(B) imposes an array of duties on agencies charged with ensuring the safety of Oregon's most vulnerable citizens, which are mirrored in the Department's administrative rules and practices. Among those duties is the responsibility to take prompt action when a verified report of physical injury is received, not only to assist and

protect those who have been injured, but to prevent further injury. Even if he was unsure of what action to take, Rodriguez could have consulted his training manual or contacted a manager for assistance. In fact, when he did call Aubrey Roach at home on Saturday, she advised him to get a safety plan from GUTD's director. His failure to do so meant that for over three days, he had no idea if this child was safe or what steps had been taken, if any, to protect him. What makes his lack of action particularly egregious is that Rodriguez received additional compensation for performing his on-call duties.

"A key element in the rationale behind progressive discipline is that it gives an employee the opportunity to correct his or her behavior." *Boaz v. State of Oregon, Office of Private Health Partnerships, Family Health Insurance Assistance Program, MA-10-09* at 19 (November 2010). Here, the potential consequences of Rodriguez's non-compliance with state law could have been far more serious. Under these circumstances, the balancing of mitigating factors cannot overcome the magnitude of his failure to act.

For the foregoing reasons, we conclude that the OIT reasonably determined that Rodriguez was not capable of performing his duties and his "unfitness to render effective service" was evident from his mishandling of this child abuse report. The Department properly removed Rodriguez from management service and in doing so, did not act in an arbitrary or unreasonable manner. We will dismiss the appeal.

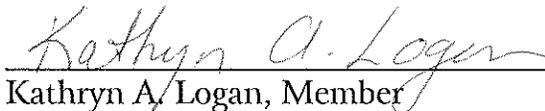
ORDER

The appeal is dismissed.

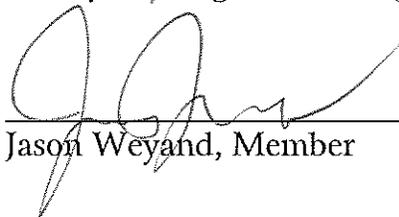
DATED this 12 day of July, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Member



Jason Weyand, Member

This Order may be appealed pursuant to ORS 183.482.