

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-016-11

(MANAGEMENT SERVICE REMOVAL & DISMISSAL)

TERRY L. CLINTON,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON, OREGON	)	CONCLUSIONS OF LAW,
MILITARY DEPARTMENT,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) Peter A. Rader on June 6 and 8 and July 12, 2012, in Salem, Oregon. The record closed on August 3, 2012, following receipt of the parties' post-hearing briefs. The ALJ issued his Recommended Order on February 12, 2013. The Board heard oral arguments on Appellant's objections to the Recommended Order on April 30, 2013.

Kevin T. Lafky, Attorney at Law, Lafky and Lafky, Salem, Oregon, represented Appellant.

Tessa M. Sugahara, Supervising Attorney, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent at the hearing. Senior Assistant Attorney General Steven Krohn represented Respondent at oral argument.

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On September 20, 2011, Appellant Terry L. Clinton filed this appeal of his removal from management service and dismissal from State service pursuant to ORS 240.570(3) and ORS 240.555, as referenced in ORS 240.570(5). At the time, Clinton was a Principal Executive Manager D (PEM D) at the Oregon Military Department.

The issue presented is:

Was Appellant's removal from management service and dismissal from State service on or about August 22, 2011, consistent with ORS 240.570(3), ORS 240.570(5), and ORS 240.555?

For the reasons set forth below, the Board concludes that Clinton's removal from management service and dismissal from State service was consistent with ORS 240.570(3), ORS 240.570(5) and ORS 240.555. Accordingly, we uphold the State's actions and dismiss the appeal.

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDING OF FACTS

1. As part of its mission, the State of Oregon, Oregon Military Department (Department) administers, houses, equips, and trains the Oregon Army National Guard (ORARNG) as a reserve force for the United States Army and Air Force, and the State of Oregon during natural disasters or civil unrest. Approximately 50 percent of its employees are active guard and reserve personnel, 30 percent are federal civil service employees, and 20 percent are State employees.

2. Clinton was in the ORARNG for 27 years. He attained the highest enlisted rank of command sergeant major. His duties included managing million-dollar construction projects and supervising up to 650 soldiers. His performance evaluations were consistently positive and he received a number of commendations for his work.

3. In 2000, Clinton was hired by the Department as a project inspector, a civilian, classified position in the Installations Division. The Installations Division constructs, maintains, and operates joint facilities for federal, state, and local agencies around the State.

4. His performance reviews were positive. In October 2007, the State Personnel Office requested approval from the Department's deputy director, Brigadier General Mike Caldwell, to award a special merit pay increase to Clinton for his outstanding performance. The request was based on the extra duties Clinton assumed when two project manager positions became vacant. The request noted the long hours he worked, his training of new managers, and his successful shepherding of multiple projects to completion, without which the State "would not have been able to execute over \$4 million in contracts." His performance review in December 2005 states that he met expectations but was advised to "[i]mprove rapport with Installations Contracting & Purchasing."

5. In 2008, Clinton was promoted to management service in the Real Property Operations and Maintenance branch of the Installations Division as the Minor Construction Program Manager, a PEM D classification. He was responsible for supervising the building and refurbishing of armories around the State, including preparing project specifications, as well as overseeing the budgeting, planning, design, construction, and inspection of minor construction projects up to \$750,000. He managed between 50 to 70 projects per year with a total value ranging from \$3 to \$30 million, which were funded from federal and state sources. He supervised five people, including two project managers and three project inspectors.

6. Clinton's direct supervisor was the acting Director of Installations, Major (Ret.) Roy Swafford. Swafford would sign the construction contracts, but Clinton was responsible for supervising and ensuring that they were completed on time and within specifications. Clinton frequently worked long hours and he was commended for helping to develop a program for achieving excellence in contract management. His last performance evaluation, in 2008, was positive, and until this matter arose, he had never been disciplined.

7. Clinton and his staff worked in an open-spaced office environment at the Salem Army Reserve Center where conversations could be overheard and laptop computers were in plain view.

Relevant Policies and Procedures

8. On January 14, 2011, Clinton signed the latest version of the ORARNG's Acceptable Use Policy (AUP), regulating use of the Department's computers and Internet use. That policy, which managers are required to sign annually, states in part:

"2. Access. Access to this network is for official use and authorized purposes as set forth in DOD [Department of Defense] Directive 5500.7-R (Joint Ethics Regulation) AR 25-2 (Information Assurance), and ARNG and Army network policy and accreditation.

"\* \* \* \* \*

"6. User Minimum-security rules and requirements. As a SIPRNET and/or NIPRNET system user,

"[Paragraphs a through q omitted]\* \* \* \* \*

"r. I understand that monitoring of SIPRNET and NIPRNET will be conducted for various purposes and information captured during monitoring may be used for possible adverse administrative, disciplinary or criminal actions. I understand that the following activities are prohibited use of an Army [Information System]:

“1. Unethical use (e.g. Spam, profanity, sexual misconduct, gaming, extortion).

“2. Accessing and showing unauthorized sites (e.g. pornography, streaming videos, E-Bay, chat rooms).”

9. The Department of Administrative Services (DAS) develops, maintains, and monitors policies related to standards of conduct in the workplace. Among its policies is Policy 50.010.01, Discrimination and Harassment Free Workplace; and Policy 50.010.03, Maintaining a Professional Workplace. Managers are required to be familiar with these policies.

10. On December 8 and 9, 2008, Clinton completed training on Domestic Violence Awareness, and on August 18, 2010, he completed a class in Performance Management Training.

#### Events Giving Rise to Clinton's Discipline

11. In a letter dated May 26, 2011, a union representative wrote to Brigadier General Caldwell informing him of concerns regarding Clinton.<sup>1</sup> These included allegations that Clinton used inappropriate language directed at employees and outside vendors, criticized his employees in front of other staff, forwarded inappropriate e-mails, used a Department computer to visually monitor his home, showed employees how to dump their Internet search history and advised them to do so weekly, and possibly had pornography on his office computer. The letter also referenced an incident at a restaurant in which Clinton made a vulgar remark about oral sex that was overheard by a member of the public.

12. The union's letter was routed to the Department's Human Resource (HR) Manager for civilian employees, Stephen Petit. Petit directed HR Investigator Paul Geck to investigate the allegations of unprofessional conduct towards staff. Geck conducted interviews with all five of the employees supervised by Clinton who reported Clinton's pattern of using profane language and bullying in the workplace.

13. One of the employees, TM,<sup>2</sup> reported walking by Clinton's work station and seeing a photo of a woman naked from the waist up displayed on his Department laptop. When Clinton noticed her looking, he immediately closed the window. This same employee reported that Clinton would observe her going to the ladies' room or getting coffee, and that he would count both as taking a break. She felt like she was being spied on, and documented several of these incidents on her Outlook calendar. She also reported an incident while driving to lunch in Clinton's truck, when he asked her to roll down the window and invite a woman stopped at a red light to join them for lunch. This same employee reported that he made disparaging remarks about women and Mexicans. Clinton is married to a Hispanic woman, but the offensive comments were corroborated by other employees. She also stated that Clinton advised his employees to regularly delete their browsing history on their computers.

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<sup>1</sup>Unless indicated otherwise, all remaining dates are in 2011.

<sup>2</sup>Employees' initials are used from this point forward.

14. Employee MW was absent from work due to his wife's serious medical condition. When he returned to the office and described the situation as extremely stressful for his family, Clinton remarked "why don't you just shoot the bitch," or words to that effect.<sup>3</sup>

15. On another occasion, Clinton openly criticized employee MF for forty-five minutes about the way he was installing an HVAC system, when in fact he was doing it correctly. MF claimed not to be upset by the criticism or Clinton's use of profanity or sexual innuendo in the office, but did not deny that it occurred.

16. On at least one occasion, Clinton criticized an outside vendor so aggressively that she ended up in tears.

17. Investigator Geck's notes of each interview, which were signed by the employees and confirmed by them to be accurate, substantiated the atmosphere in the office and Clinton's pattern of sexist and racist comments, and his bullying of employees and vendors. Their responses to his questions are as follows:<sup>4</sup>

"Question #1: Describe your working relationship with Terry Clinton?"

- "• Alright, he has high expectations and is high paced.
- "• Tense, he yells at us in front of each other. It is uncomfortable and embarrassing, not constructive or motivating.
- "• We have a working relationship.
- "• We get along, he is gruff, rules by tyranny, and blows things out of proportion.
- "• He's the boss, so I do what he tells me to do.

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<sup>3</sup>Clinton initially denied making the remark, but later suggested that he may have said something similar in jest. We credit the testimony of the employees who heard it because the offensiveness of the comment would not likely be forgotten, and because TM recalled having to calm MW down so that he would not confront Clinton.

<sup>4</sup>Appellant argues that the Board should grant the appeal, because doing otherwise would require us to rely on the credibility of Mr. Geck. Appellant notes that Geck was subsequently removed from management service as a result of allegations of falsifying information on State job application materials. Mr. Geck appealed this action to the Board, and that we upheld the removal. *See Geck v. State of Oregon, Oregon Military Department*, Case No. MA-22-12 (May 2013). However, Geck's investigatory notes were reviewed by each witness and signed, confirming their accuracy. Thus, we are not relying on Geck's credibility, but rather the credibility of the reviewed and signed statements of the witnesses, along with Clinton's own statements and written submissions to the State, which confirmed many details of the witnesses' statements. Moreover, Geck was not a decision maker regarding Clinton's discipline. Therefore, we give little weight to Geck's opinions or recommendations that were contained in the report.

“Question #2: What attributes make Terry a good or poor supervisor/manager?”

- “• Diligent about getting things done. Very high expectations of employees. Bullish about getting things. Usually fair. Doesn't ask for extra hours, but I work them anyway.
- “• Knowledge of pride and contracts. Doesn't control his temper and regularly makes sexual comments at inappropriate times.
- “• Does okay, sometimes gets on employees in meetings inappropriately. Expects extra, but compensates for it.
- “• Knowledgeable about the job, but lacks any people skills. He is rude and crude and can be embarrassing in public.
- “• Knows contracts. Sometimes forgets what he tells you.

“Question #3: Have you ever seen Terry act in an unprofessional manner?”

- “• Racist and sexist, calls Mexicans stupid and while driving to lunch asked an employee to roll down their window and ask the lady next to them if she would join them. Accesses employee computer profiles to monitor what we have been doing.
- “• Raises his voice often trying to get his point across. Refers to others as 'pot lickers.' Sent inappropriate e-mail to female vendor and upset her badly enough that she cried. He has derogatory cell phone ring tones for people.
- “• Terry yelled at me in front of contractors on the job site about not getting approval for the work when he was the one that approved it. He then went to the contractors and questioned them about how they were doing their jobs. The contractors were offended and I was embarrassed.
- “• Treated a vendor like a complete moron during a meeting. Does not allow employees to do anything without his approval, 'I'm the boss.' Offended an elderly couple in a restaurant talking about a blow job. He stares at women and comments about hooters and butts regularly.

“Question #4: Do you have anything you would like to add?”

- “• Could slow down a little, other than that he is a good supervisor.
- “• Manages with fear and holds jobs over employee’s heads. Intimidates people.
- “• Bullies, demeans, and embarrasses employees in front of each other. Uses foul language.
- “• Doesn’t communicate well and has no respect for us, he talks about us behind our backs.
- “• Knowledgeable, but difficult to work for. Considers going to the restroom or getting a cup of coffee a break.”

Geck’s report recommended that Clinton be removed from a leadership role until he could “show the ability to use proper supervisory skills and behave in a professional manner.”

18. The Department has an information technology (IT) unit that purchases, maintains, and monitors electronic equipment. The IT unit works out of the office of the Deputy Chief of Staff for Information Management (DCSIM). HR Manager Petit ordered an investigation related to the content of Clinton’s Department laptop computer.

19. On June 1 and 2, Joshua Rice, an analyst for DCSIM, reviewed the content of Clinton’s laptop and discovered approximately 5,000 non-work related images in the form of JPEGs, 189 WMV files, and 2 MP3 audio files.<sup>5</sup> Clinton had created a directory on his Department computer labeled “Terry’s files,” and had organized the content into various files or folders based on subject matter such as women, humor, and other subjects. Rice copied the contents onto CDs for assessment and categorized them as (a) movies and videos; (b) pornography; and (c) PowerPoint presentations.

20. Under the pornography file that Rice created from material found on Clinton’s computer were more than 100 photos, many of them sexually graphic, as well as adult-oriented cartoons. Examples of the images found include photos of a couple having intercourse on a bridge, two women engaging in sex acts on a boat in front of a male audience, eight women having oral sex, an airplane inserted into a woman’s vagina, and a lewd, sexist cartoon. The PowerPoint folder included two slides that contained images of nude or semi-nude females posing in the snow. Clinton had received these images via e-mail from coworkers or other sources, which he alleged were all unsolicited. Clinton, however, downloaded, organized, and stored the images in a

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<sup>5</sup>The DCSIM owns the network and sets the rules regarding usage, which apply to civilian employees. Pursuant to its procedures, the DCSIM obtained permission from the office of the ORARNG Judge Advocate General before inspecting Clinton’s work computer.

directory that he created and maintained on his Department computer. When a JPEG file is attached to an e-mail, it requires a deliberate act to move the file into a folder or subdirectory. At one time, the military and the Department had a higher tolerance for the dissemination of inappropriate material, but around 2004 it adopted a “zero-tolerance” policy. This was reflected in the AUP that Clinton signed annually, most recently in January.

21. On June 6, Clinton was duty-stationed at home, pending the investigation’s outcome. On July 26, HR Manager Petit sent Clinton a memorandum notifying him of its “Commencement of Pre-Dismissal Process and/or Removal from Management Service.” The grounds for the discipline were “[m]isconduct, inefficiency, malfeasance and other unfitness to render effective service (ORS 240.555)” and being “[u]nable or unwilling to fully and faithfully perform the duties of the position satisfactorily” under ORS 240.570(3). Specifically, the notice alleged that Clinton had violated the AUP by having pornography on his workplace computer, and that he demonstrated a pattern of “rude, inappropriate interactions with subordinates and the public.” The memorandum stated in part:

“A short detail of findings includes a sequence of pictures which depict sexual intercourse on top of a bridge, a model plane inserted into a vagina, and a series of photos depicting two women on a boat putting on a show in front of an audience. Included in the ‘boat series’ is oral sex, insertion of an object into a vagina, and some nude shots. Also included is a photo titled ‘Don’t Break the Chain’ in which eight young women are in a variety of poses suggestive of oral sex. There is also at least one highly offensive sexist cartoon, and there are several other nudes, partial nudes, women in see-through outfits and a multitude of inappropriate cartoons and photos. This is inconsistent with the values expected of State employees, particularly managers.

“A review of the document dates from a set of pictures downloaded in October match a time-card that shows you were in the office. The DCSIM indicated that these photos along with several video clips were on your computer hard drive.

“Among other findings during our investigation is a pattern of rude, inappropriate interactions with subordinates and the public. Among the things that most stand out is your comment at Denny’s restaurant that you would like a blow job from a waitress. Although you waited until she was out of earshot, another member of the public heard the comment. The incident was witnessed and relayed by co-workers. Your telling [MW] that he should just kill his wife because of her medical problems is another example of boorish behavior.”

22. In a letter dated August 1, Clinton apologized for his actions, and acknowledged that the directory labeled “Terry’s files” was a collection of e-mail attachments that were sent to him over the past 11 years. He claimed to have received all of them from friends or coworkers but denied going online in search of illicit materials. He wrote that many of the files were humorous, even though they were adult-oriented, and that he intended to compile them into a book when he

retired. He also acknowledged making a sexual remark at Denny's, but explained that it was taken out of context. He denied making the statement to MW about his wife or making racist remarks. He also pointed out his achievements and successes over the years on behalf of the Department.

23. On August 3, Clinton attended a "Loudermill" hearing with HR Manager Stephen Petit and Clinton's supervisor, Roy Swafford.<sup>6</sup> Petit pointed out that Clinton had signed the latest version of the Information Assurance Form on January 14, which allowed DCSIM to seize his computer. Clinton stated that he kept the pornography sent to him by others on his computer in case IT ever needed to investigate it, that he allegedly forwarded some images to IT for the purpose of reporting it, and that IT advised him to store it on his hard drive.<sup>7</sup> He did not identify who sent him the pornographic images, or to whom in IT he forwarded it to for investigation. He recalled that after he saved the images to his hard drive he never opened them again, and denied ever looking at pornography at home or work. He denied shouting at or demeaning his employees and argued that the Department had a huge investment in him and that his value far outweighed his outbursts.

24. Swafford never authorized Clinton to store pornographic images on his computer or told him to forward them to IT. Swafford credibly testified that if he had known about the existence of such material, he would have stopped it.

25. On August 18, Petit sent Clinton a notice of dismissal from State service, effective August 22. Petit's letter summarized the questions and Clinton's answers at the pre-dismissal meeting, including Clinton's acknowledgment of the Information Assurance form, which allowed DCSIM to seize or inspect data on his computer. The letter included a detailed description of the images captured by that inspection, and stated that Clinton was in the office when some of them were downloaded. The letter also recounted Clinton's inappropriate comments made to staff and the public, and that the Department rejected his denials or justifications. The letter also stated that when Clinton was asked what he thought the appropriate punishment might be, Clinton replied that he thought he had already suffered enough punishment due to a salary reduction because of all the extra hours he worked.

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<sup>6</sup>The name of the hearing derives from the U.S. Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in which the Court ruled that due process must be provided to a government employee before removing or affecting the employment property right, including providing notice of the grounds for discipline and an opportunity to be heard.

<sup>7</sup>This statement is not credible. Major Robert Baugh, Information Systems Technology Specialist, and the systems administrator for the Department, testified that he would never make that suggestion because it would violate the information and acceptable use policies. In fact, it is Major Baugh's responsibility to report such activity.

26. On September 19, Clinton wrote a seven-page letter to Brigadier General Caldwell asking him to reconsider the Department's decision. His letter put forth many of the same arguments raised in his August 1 letter. He denied or attempted to justify or discount his actions and wrote that Petit based his decision on lies and half-truths. He complained of being singled out for punishment while other Department employees engaged in far worse behavior without consequences. He complained of not being provided representation at the pre-dismissal meeting, as union members are, and that he was not presented with hard evidence of his alleged conduct, such as the pornographic images obtained from his computer. He denied making the statement regarding MW killing his wife. He clarified his comments made at the Denny's restaurant:

"MW was making humorous but crude conversation with the waitress and when she was gone MW made a couple of more comments and I said to MW 'I guess a blow job is out of the question isn't it,' and during the Hearing I told [Petit] if I knew anyone else at other tables heard me I would have immediately made an apology to them."

Regarding the pornography allegations, Clinton suggested that, notwithstanding his time card indicating he was in the office when some of the images were downloaded, someone else, possibly from IT, could have put them there. He again alleged that he notified IT of the materials he received and that Robert Baugh advised him to keep it on his hard drive. He cited a definition of pornography as intending 'to cause sexual arousal' and that because he was not sexually aroused by any of the images, it was not pornography, and then compared female nudity to art. He also denied making inappropriate comments about race or gender to his staff, or that he violated any DAS policies. He described the employees who complained, particularly MW and TB, as problematic employees who needed to be closely monitored, thereby implying that their statements were retaliatory. Finally, Clinton argued that his hard work, long hours, and contributions to the Department should have been taken into account.

26. The Department has consistently disciplined other civilian employees for having pornographic images on its computers, but the severity of discipline depends on the nature and amount of material, whether it was intentionally stored on a computer or passively received, and the position held by the employee in the organization. No Department employees have been dismissed for having pornography on their work computers. A custodial employee received a two-step pay reduction for two months for having a couple of pornographic images on his work computer and spending too much time conducting personal searches in excess of the time allotted.

27. Other employees, mostly reserve or active duty soldiers, have typically resigned, been reassigned, or been removed from promotion lists for accessing or storing pornography on their computers. These are reviewed on a case-by-case basis.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Clinton's removal from management service did not violate ORS 240.570(3).
3. Clinton's dismissal from State service did not violate ORS 240.570(5) and 240.555.

## DISCUSSION

On August 22, 2011, Clinton was removed from management service and dismissed from state service pursuant to ORS 240.570(3) and 240.570(5), which incorporates the grounds for discipline under ORS 240.555. The Department's notice of dismissal cited three primary reasons for its decision: (1) his inappropriate or offensive language directed at employees and non-employees; (2) his treatment of employees; and (3) downloading and storing unauthorized and pornographic material on his Department computer. Clinton denied many of the allegations and put forth various mitigating arguments, including his exemplary work record, the fact that other employees engaged in similar activity without comparable punishment, and the lack of progressive discipline.

ORS 240.570(3) provides that a management service employee may be removed from management service "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). Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee "may be dismissed from state service only for reasons specified by ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560." *Id.* at 22. The reasons for discipline or discharge under ORS 240.555 are: "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service." This Board has defined misconduct as "a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior. . . ." *Id.* at 26. (Emphasis in the original.) In addition, the conduct must involve intentional wrongdoing in order to meet the definition of misconduct under ORS 240.055. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied* (September 2006).

Clinton's status as a former classified service employee requires us to consider the two personnel actions separately. Accordingly, we use a two-step process. First, we begin by determining whether the State proved the charges that the actions were based on. If so, we then apply the reasonable employer standard to determine if the State's removal of the employee from management service was lawful. Finally, we determine whether the State acted lawfully when it dismissed the employee from state service. The reasonable employer standard that we use when reviewing a removal from management service under ORS 240.570(3) is different from the standard that we use when reviewing a dismissal from state service under ORS 240.570(5) and 240.555. The standard to justify removal from management service is relatively minor, and

management employees may be held to strict standards of behavior so long as the standards are not arbitrary or unreasonable. *Mabe* at 25. A removal from management service may be based on a single proven charge. *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 30 (March 1992).

When we apply the reasonable employer test to review a dismissal from state service, we apply a more stringent standard, and charges that are sufficient to support a removal from management service may not be sufficient to justify a dismissal from state service. *Mabe* at 23. For dismissal cases, the Department must establish that its action “was taken ‘in good faith for cause.’ ORS 240.570(5), 240.555, ORS 240.560(4).” *Plank* at 29.

When this Board applies the “reasonable employer” standard, we conduct an evaluation of all of the circumstances surrounding the removal or dismissal to determine whether the employer’s action was 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). Where no prior disciplinary actions have been taken against an employee, we must also 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). The Department has the burden of proving that each of its personnel actions was lawful. OAR 115-045-0030(6).

#### Evidence of Clinton’s Misconduct

The Department proved that Clinton had a pattern of using profane or inappropriate language with his employees in public, criticizing and bullying his employees and outside vendors, and storing pornography and other inappropriate material on his Department laptop. Clinton’s employees credibly reported to HR Investigator Geck that he frequently used profanity and routinely made racist and sexist remarks in front of them. Clinton admitted making a statement at a restaurant to the effect “well, I guess a blow job is out of the question, isn’t it?” The remark was made out of earshot of the waitress he was referring to, but it was overheard by a couple seated at the next table who reported it. At the time, Clinton was having lunch with two male employees who were wearing clothing or badges identifying them as Department employees. Clinton’s willingness to apologize, if had he known that anyone overheard him (presumably other than his employees), does not mitigate the crudeness of the remark.

Clinton also made a comment to one of his employees, who was under a great deal of stress due to his wife’s hospitalization, to the effect of “why don’t you just shoot the bitch?” Clinton initially denied making the statement, and then said he may have said something to that effect, but only in jest. His comment, however, was not construed that way by the employee involved. Clinton also criticized a vendor so harshly that she ended up in tears. He also criticized another employee at length about his installation of an HVAC system, only to find out that the employee was correct.

Another time, Clinton asked one of his employees to roll down her window and invite a woman stopped at a traffic light to lunch.

The second factor in the Department's decision was Clinton's alleged treatment of subordinates. He acknowledged that he sometimes acted harshly towards employees or vendors who, from his perspective, were not doing their jobs, especially those employees who had previous disciplinary issues. Clinton's management style, however, was to bully or berate these employees, often in front of other people. This also included harsh treatment of vendors doing business with the Department. Furthermore, Clinton monitored the bathroom and coffee breaks of another employee because he believed that she was taking too long, which made her feel as if she was being spied on. Clinton's response to these charges was to initially deny them, or to state that he was justified or acting in jest. Whatever the rationale for these actions, Clinton's conduct was contrary to his training and Department policies for maintaining a professional and harassment-free workplace.

Clinton worked in a demanding job that included a great deal of responsibility, but the credible evidence demonstrates that he consistently used inappropriate language and treated his employees in an unacceptable manner, both of which were incompatible with his training, violated Department policies, and fell short of the expectations of a Department manager.

The third factor in the Department's decision was the volume of unauthorized and pornographic material stored on his work computer. The IT investigation revealed more than 5,000 non-work-related images that included adult cartoons, humor, and family photos, but also more than one hundred images of nude women or couples engaged in sexual activity. Clinton initially claimed that he was a passive recipient of these images and that he was not even aware of what was on his computer, but later admitted that he had been storing material for about 11 years. He also argued that nudity could be considered "art," that he was not aroused by the images, and that he never looked at pornography at work or home; the latter argument was contradicted by an employee who observed him viewing an image of a naked woman on his work computer.

Clinton also claimed that he was directed by someone in the Department's IT section to save the pornographic images on his hard drive, and that he even forwarded some of the images to the IT section. These arguments are not credited. IT Specialist Robert Baugh, who examined Clinton's hard drive, credibly testified that none of the images could have been stored on his computer without a deliberate act. The folders or subdirectories were labeled "Terry's files" and were divided by subject matter. Baugh also denied telling Clinton to save the images on his hard drive, or that any of the images were forwarded to him for investigation. Had Baugh done so, he would have violated the Department's policies and could have been disciplined.

Clinton's direct supervisor, Roy Swafford, also testified that he would have taken immediate action if he had known that this material was stored on Clinton's computer. More importantly, Clinton had signed the Department's AUP, as he did annually, as recently as January 2011. He was aware of the restrictions placed on his use of Department computers, and yet ignored them in direct violation of that policy.

Based on this evidence, the Department proved that Clinton engaged in deliberate conduct that violated Department policies, ignored his training, and fell below the standards expected of Department managers. .

#### Removal from Management Service

With all three of the allegations proven, we now consider whether Clinton was properly removed from management service based on the reasonable employer standard. In applying this standard, we determine whether he was unwilling or unable to fully and faithfully perform the duties of the position satisfactorily, as required by ORS 240.570(3). The standards for a manager are high, although as noted above, they must not be arbitrary or unreasonable.

Clinton demonstrated a consistent pattern of poor judgment and mismanagement that, for someone of his experience and training, should have not have occurred. His initial denials and justifications demonstrate that he was either unaware that his conduct was unacceptable despite his training and clear employer policies, or that he did not understand the seriousness of his actions. In either case, he initially denied or attempted to justify all of the allegations, even in the face of substantial evidence to the contrary. Clinton also attempted to deflect blame onto his subordinate employees, Mr. Petit, and others during the course of the investigation and removal. He did not accept responsibility for his actions or demonstrate that he was willing or able to make meaningful changes. This lack of accountability, coupled with the evidence of repeated misconduct over an extended period of time, demonstrates an unwillingness to perform the duties of his job fully and faithfully, and it is not appropriate to return Clinton to his management position.

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 has 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). We conclude that the Department properly determined that Clinton was not capable of performing his managerial duties, and that his "unfitness to render effective service" was evident from his conduct. The Department properly removed Clinton from management service, and in doing so, it did not act in an arbitrary or unreasonable manner. *Mabe* at 26.

#### Dismissal from State Service

We next consider whether Clinton's dismissal from state service was in good faith for cause. *Plank* at 29. Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee "may be dismissed from state service only for reasons specified by ORS 240.555," which permits the Department to dismiss a classified employee for "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance, 'or other unfitness to render effective service.'" *Mabe* at 26. To meet this standard, the employer must also establish that it used progressive discipline, except when the employee's offense is gross or the employee's behavior would not be improved by progressive measures. *Peterson* at 10.

The Department based Clinton's dismissal on misconduct. We have defined misconduct as "a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior . . . For purposes of ORS 240.555 'misconduct' involves intentional wrongdoing." *Mabe* at 26. The Department argues that Clinton's pervasive use of profane, sexist, and racist language in the office; his public criticism of employees and vendors; and his intentional storage of prohibited material on his Department computer amounted to misconduct that warrants dismissal from State service. Such behavior, it argues, violates its policies, deviates from the standards set by the Department for its managers, and undermines its confidence in his ability to make the necessary changes.

We agree with the Department. Much of Appellant's conduct was clearly outside of the Department's established policies and expectations. Further, some of Clinton's actions were egregious as well, and reinstating him could have a significant negative impact on the Department and its employees. In sum, the Department has proved that the totality of Clinton's behavior amounted to misconduct that undermined the Department's belief that he could faithfully perform the duties of his job. Moreover, the Department proved that his conduct would not likely be improved with progressive measures.

#### Reasonableness of the Discipline

We now determine whether the Department acted as a reasonable employer in dismissing Clinton, rather than imposing some lesser form of discipline. 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 actions(s), and the likelihood of repeated misconduct. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 (June 2001). Clinton argues that the Department provided no evidence of a civilian employee previously being dismissed from state service for possessing pornography and, in light of his otherwise clean record and the Department's investment in his contract management expertise, the mitigating factors outweigh his misconduct.

The Department may not have previously dismissed an employee for possessing pornography on a workplace computer, but the volume of material contained in Clinton's files was well above the average amount found in prior situations. Further, the Department proved that each case is examined independently based on the nature of the material, the volume of images found, consideration of aggravating and mitigating factors, and the position held by the employee. Clinton signed the AUP annually and was aware of its requirements and standards, and yet knowingly downloaded, stored, and viewed this material on his work computer in violation of that policy for many years. He either did not believe the policy applied to him or thought that he would not get caught, but in either case, the conduct was intentional and amounted to misconduct. Moreover, Clinton's misconduct was not limited to storing pornography on his computer as were other situations raised in testimony; he also used profane, sexist, and racist language in the workplace and was abusive to his subordinate employees and outside vendors. These additional grounds of

misconduct justify a more serious disciplinary response by the State than may have been imposed on other employees in previous situations that involved only pornographic images. As a result, a direct “apples-to-apples” comparison is not meaningful in this particular case.

Although it is true that Clinton received no prior discipline in his 11 years of State service, and was awarded a merit pay increase and commended for his excellent contract management skills, the Department expects more than just technical expertise from its employees. The State can also reasonably expect its employees to comply with established policies and to maintain appropriate boundaries with coworkers. A fundamental part of that expectation is exercising good judgment and treating employees and the public with courtesy and respect. As an employee, Clinton received training in these areas, and he cannot reasonably argue that he was unaware of these expectations. Furthermore, these actions were indicative of a longstanding pattern of conduct. Clinton admitted storing images on his computer throughout the 11 years he worked for the Department. His employees reported that his use of profane language was a regular part of his vocabulary, and that his treatment of vendors and employees was an ongoing issue.

It is also significant that when Clinton was confronted with these allegations, he denied them, said they were taken out of context, or suggested that someone else was responsible.<sup>8</sup> He did not sufficiently acknowledge his wrongdoing, and we do not find that he expressed a sincere interest in changing his behavior. This underscores the difficulty in returning him to a position in the Department because it demonstrates a certain unwillingness to change his behavior.

As a final matter, we address Mr. Clinton’s assertion that we should defer to what he claims to be the opinion of his direct supervisor, Mr. Swafford, regarding his continued employment with the State. Swafford at one time stated that he believed that Clinton should be given a second chance and be allowed to continue his employment, and that removal from state service was excessive. However, Swafford testified that he made these comments before he knew the full range of allegations against Clinton and before he had reviewed the material stored on Clinton’s computer. The opinion of a direct supervisor may be relevant to our analysis under certain circumstances, but our primary concern is the application of the statutory requirements to the facts in the record. As a result, even assuming Swafford’s opinion was the same after reviewing all of the materials at issue, it would not change our decision on this matter. Swafford’s opinion, when compared to the facts established by the State, is insufficient to justify reinstating Clinton.

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<sup>8</sup>At hearing, Clinton portrayed some members of his staff as disgruntled employees who were out to get him because he was a strict manager. The testimony regarding his conduct, however, was credible, consistent, and corroborated by more than one employee, and in some instances, by Clinton himself.

Under the totality of these circumstances, we agree with the Department that Clinton's conduct would not likely be remedied by progressive measures, and that the Department's decision to remove him from management service and dismiss him from State service was objectively reasonable and consistent with ORS 240.570(3), ORS 240.555, and 240.570(5). We will dismiss the appeal.

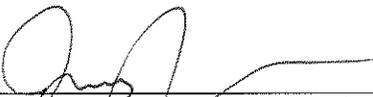
ORDER

The appeal is dismissed.

DATED this 4 day of June 2013.

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\*Kathryn A. Logan, Chair



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Jason M. Weyand, Member



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Adam L. Rhynard, Member

\*Chair Logan did not participate in the decision in this case.

This Order may be appealed pursuant to ORS 183.482.