EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-008-14

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

CARRIE NASH,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
	)	
Respondent.	)	
	)	

This Board heard oral argument on December 3, 2014, on Appellant's objections to an October 10, 2014, recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell after a hearing on July 22-23, 2014, in Salem, Oregon. The record closed on August 15, 2014, with the receipt of the parties' post-hearing briefs.

Talia V. Stoessel, Attorney at Law, Bennett Hartman Morris & Kaplan, LLP, Portland, Oregon, represented the Appellant.

Brena Moyer Lopez, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On March 20, 2014, the State of Oregon, Department of Human Services (Department or DHS) removed Carrie Nash (Appellant or Nash) from her management service position and dismissed her from State service. On April 21, 2014, Nash filed a timely appeal of her removal and dismissal.

The issue is:

Did the Department remove Nash from management service and dismiss her from State service consistent with ORS 240.570(3), ORS 240.570(5) and ORS 240.555?

For the reasons set forth below, we conclude that the Department removed Nash from management service and dismissed her from State service 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.

FINDINGS OF FACT

Background

1. During the relevant times and events, the following individuals held the respective positions with DHS:

Brock Wallace	Internal Investigator (Human Resources Analyst), Office of Human Resources
Patrick Carey	District Manager for Children Welfare Services for District 10
Joni Gallinger	Program Manager for Child Welfare in District 10
Kenneth McGee	Senior Human Resources Manager

2. In March 1998, Nash began working for the Department's child welfare services in Oregon City, Clackamas County. She worked in Clackamas County over 14 years. She began as an ongoing case worker, where she worked with children in residential care, children in home care, in substitute care, and in foster care. She then worked with termination-of-parental-rights cases and returning children to home care. In September 2004, Nash was promoted to a consultant/educator trainer position. In September 2007, Nash was promoted to a position as a protective service supervisor, which is classified as a Principal Executive Manager C (PEM-C) in the management service. DHS unilaterally transferred Nash to the North Clackamas branch of Clackamas County in April 2012, where she remained until August 2012. Before the events at issue here, Nash had an exemplary and unblemished record as a child welfare worker and subsequently as a child welfare supervisor. She was consistently rated as exceeding expectations.

3. Given the issues, situations, and trauma that staff deal with on a day-to-day basis, child welfare and protective service work is a difficult and extremely stressful occupation. The workers and supervisors cope with the stress in different ways. Nash, and others, regularly used crude and even profane language and related "blue" humor among coworkers. The use of profanity was common in the workplace at Clackamas County. The use of joking—described as dark humor—was also prevalent and accepted. Staff and supervisors regularly vented about their supervisors. Child welfare workers and supervisors needed to let down and unburden themselves. Nash was known to her supervisors and managers as having a colorful, and at times off-color, sense of humor. However, the staff and supervisors remained professional with the clients and the public. While in Clackamas County, Nash did not receive any coaching, letters of expectation, or discipline concerning her communication style.

4. During her career with the DHS, Nash attended several training sessions, including: Cultural Competency and Diversity, Diversity Conference for 2012, Building Effective Teams, CAF Core Values, Cultivating a Diverse Workforce, Delivering Communications that Get Results, Essentials in Human Resource Management, Ethics, Creating and Maintaining a Respectful, Harassment and Discrimination Free Workplace, and Creating a Legal Work Environment.

5. In the summer of 2012, Nash applied for a supervisory position in District 10, which provides child welfare services for Crook, Deschutes, and Jefferson counties. District 10 has four branch offices.

Gallinger, one of the program managers for District 10, initially interviewed Nash for the position. She also conducted reference checks. The references stated that Nash was an experienced child welfare worker and supervisor, was very knowledgeable about the work, and had some very good skills. However, the references also raised certain concerns: Nash at times used rude and profane language and was sometimes tardy. District 10 Manager Carey also called one of Nash's former colleagues. The reference indicated that Nash could be successful. Gallinger and Carey took note of the concerns, but were willing to give Nash a chance as a supervisor in the district, and hired her in August 2012.

In her new supervisory position in District 10, Nash initially supervised a mixed unit of permanency workers, social service assistants, and the addiction and rehabilitation team. Gallinger and Carey were her immediate supervisors.

In June 2013, Nash transferred to the protective services supervisor position, which also was in the Deschutes branch office of District 10. Nash was the most experienced supervisor in District 10 to express an interest in the position. Nash now oversaw a staff of eight, which exclusively performed protective service work. The unit provided the immediate responders to the cases of alleged child neglect or abuse.

6. Gallinger considers Nash to be quite knowledgeable about child protective services work, particularly in determining eligibility for an assignment of children coming out of the screening unit. Nash understands childhood development and child safety, particularly where the child welfare services would take action up to and including removal. She also understands casework flow and has good people or relational skills.

Carey considers Nash to be a bright and articulate individual with a wonderful sense of humor. He believes that she has the ability to make people feel comfortable around her. She came into a branch that had been dysfunctional and that suffered from low morale. She quickly became a very popular supervisor. The staff considers Nash to be easy to talk to and extremely knowledgeable. Her staff believes that they had a strong leader who supported them and answered their questions and concerns. She provided expectations for her staff, encouraged their development, and helped them to improve in their jobs.

7. Gallinger received messages complimenting Nash, such as on October 29, 2012, when a social services assistant in the Deschutes branch child welfare unit wrote that Nash is "a wonderful supervisor * * * and gives our cases the time and energy that is needed. I just wanted

to share that with you as it's been some time since I have felt this supported. I hope she is here for the long haul." Carey acknowledged the compliment, writing to Nash, "[y]ou've done a great job in your short tenure over here, keep up the great work!"

On November 1, 2013, the director of a community partner, a child advocacy organization, expressed her pleasure at having Nash on the multi-disciplinary team (MDT). Gallinger related the compliment to Nash, adding,

> "She is so pleased with having you on MDT. You are the best we have had at interacting with all the members. She appreciates how you are clear and straightforward and also your easy going manner. She sees you as [an] expert and helpful during the MDT staffings. Bottom line, she is so appreciative you are on the Team. Way to go, Carrie. You make us proud! JG[.]"

On November 6, 2012, a social service specialist in the DHS child welfare unit in Bend wrote to Carey that

> "the past two weeks with Carrie [] our go to here in [child protective services] has been amazing. She is supportive, energetic, consistent, open, humorous, knowledgeable, and professional. * * * I have felt the most relaxed, heard, respected, and supported in the past two weeks since my first two weeks here. * * * Nash exhibits the traits a supervisor in Child Welfare should * * * and you as well as the entire Child Welfare office are lucky she is here!"

On December 19, 2013, the director of the child advocacy center referred to above, again wrote to Gallinger and Carey, complimenting Nash unreservedly and stating that she: (1) had been "transformational"; (2) "had tremendously improved the level of professionalism"; (3) "had provide[d] solid input without attitude or judgment"; (4) "had educate[d] others on the team and work[ed] cooperatively"; and (5) was "a gem." That letter also stated: "we are so lucky to have her at the table. I appreciate her sense of humor and she has fans from all disciplines."[1]

8. Early in Nash's tenure with District 10, Gallinger overheard Nash talking to staff back and forth from their cubicles and Gallinger became concerned that Nash was too casual and crude in her conversations. Gallinger cautioned Nash on her language, reminding her that as a manager she was role modeling at all times for the other employees. Gallinger talked to Nash about her language to make sure that she understood the issue, so that it would not be a problem.

Gallinger counselled Nash on occasion for unprofessional and disrespectful communications in the workplace. Gallinger pointed out that it was difficult to expect the staff to be respectful when members of the supervisory staff engaged in inappropriate behavior, such as using profanity in the workplace. To Gallinger, it was unusual to hear a supervisor speak in such

[1]The Department suggests that this letter from the director of the child advocacy center is evidence of a conflict of interest related to the events set out in Findings of Fact 27-32. However, the Appellant argues that the letter represents the regular appreciation demonstrated by the director, consistent with her compliments of Nash made on November 1, 2013. Without more, the mere date of the letter fails to persuade this Board that we should leap to the conclusion promoted by the Department.

a manner. Other supervisors were troubled by Nash's language and talked to Gallinger about it. When Gallinger discussed the issue with Nash, she appeared receptive to the comments and willing to control her language.

Maintaining a Professional Workplace Policy

9. The policy statement of DAS Policy 50.010.03, Maintaining a Professional Workplace, provides, as follows.

> "It is the policy of Oregon state government that mutual respect between and among managers, employees, temporary employees and volunteers is integral to the efficient conduct of business. All individuals work together to create and maintain a work environment that is respectful, professional and free from inappropriate workplace behavior."
>
> DAS Policy 50.010.03 defines professional workplace behavior as:
>
> "[s]upporting the values and mission of Oregon state government and the agency, building positive relationships with others, communicating in a respectful manner, holding oneself accountable and pursing change within the system."
>
> DAS Policy 50.010.03 defines inappropriate workplace behavior as:
>
> "[u]nwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state, or results in the erosion of employee morale. * * *
>
>> "Examples of inappropriate workplace behavior include but are not limited to, comments, actions or behaviors of an individual or group that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee, a manager, a subordinate, a volunteer, a customer, a contractor or a visitor in the workplace.
>>
>> "Inappropriate workplace behavior does not include actions of performance management such as supervisor instructions, expectations or feedback, administering of disciplinary actions, or investigatory meetings.
>>
>> "Inappropriate workplace behavior does not include assigned, requested or unsolicited constructive peer feedback on projects or work." (Internal footnote references and bold omitted.)
>
> DAS Policy 50.010.03 further provides:
>
> "(1) Conduct[:] Employees of all service types, temporary employees and volunteers, at every level of the agency (includes boards and commissions) must foster an environment that encourages professionalism and

discourages disrespectful behavior. All employees, temporary employees and volunteers must behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior.

"(2) Addressing Inappropriate Workplace Behavior

"(a) Supervisors must address inappropriate behavior they observe or experience and should do so as close to the time of the occurrence as possible and appropriate.

"* * * * *

"(5) Consequences

"(a) Any employee found to have engaged in inappropriate workplace behavior, will be counseled, or, depending on the severity of the behavior, may be subject to discipline, up to and including dismissal.

"* * * * *

"(d) A supervisor who fails to address inappropriate behavior, will be counseled, or, depending on the severity of the behavior, may be subject to disciplinary action, up to and including dismissal."

Letter of Reprimand: May 2, 2013

10. On April 17, 2013, Nash attended an out-of-town quarterly meeting of DHS supervisors that focused on the Oregon safety model training (OSM). At the meeting, Nash was confronted by an unexpected topic. In response, she e-mailed Gallinger, "[w]hen was I going to find out about the mandatory OSM retraining? I'm sitting at the quarterly feeling like an idiot." The message upset Gallinger, who felt insulted or attacked by the message.

11. Carolyn Nevins is a child protective consultant serving central and eastern Oregon who contracts to provide services in District 10. On April 22, 2013, Nevins sent an e-mail letter to Gallinger and Carey complaining about recent events involving Nash. Nevins explained that she had been asked to do a training session for child protective service workers in the district but that no one seemed to know about the session. Shortly before, it was discovered that the session conflicted with a leadership meeting in March 2013, and at the last minute the training session had to be rescheduled. Again, Nevins claimed, no one seemed to know about the meeting and even the child protective service (CPS) workers in the Bend office did not learn of the training session until the day before. Apparently, Nash was upset that she had to go to Bend for the "damn training." Throughout the meeting, Nevins wrote, Nash "was emailing on her iPhone, not even holding it down on her lap in an attempt to appear like she was engaged, but instead [held] it i[n] front of her face for everyone to see. I have to say," Nevins added, "that felt really disrespectful."

With respect to a second matter, Nevins explained that on April 17, she

> "got a phone call from another supervisor who was at that quarterly [supervisor meeting]. Apparently, Carrie took that opportunity to bad mouth me to a new audience, the supervisors. I guess the conversation was Carrie saying she tells her workers not to strive to be supervisors because that is the 'shit job' in the agency and if anything they should be consultants because they aren't accountable to anyone and don't do anything. [Carrie] then said, 'I only see my [CPS] consultant about once a year, if I have to. She's not accountable to anyone and doesn't do anything.' This is the same day I was in HER branch working with HER workers.
>
> "I can't even tell you how much this upset me. First of all, I've only been Carrie's [CPS] consultant for all of 2 months so I'm not sure where all of that was coming from. * * * For her to bad mouth me in a statewide meeting seems incredibly unprofessional. Not to mention uncalled for and unjustified. I've been the [CPS] consultant for the Bend office for the past 10 years, this is the first I've heard th[at] anyone there felt I was not accountable and did not do anything, which makes me think perhaps that's not the case and just Carrie's perception. * * * [E]ither way it doesn't feel good. It doesn't feel good to be talked about like that in a statewide meeting in front of people I need to continue to work with. It doesn't feel good to try to do any sort of consulting with Carrie and her workers knowing how she feels about me and how she's talking about me. * * * When my work ethic and integrity are called into question, I take that very seriously. Right now, I feel as if she's creating a hostile work environment and I'm trying to get past that."

12. On April 23, 2013, Gayla May, a program manager for child welfare services in North Clackamas County, where Nash previously had been employed, sent an e-mail to Gallinger about Nash's behavior at the quarterly meeting. May "received information from several people that she was pretty unprofessional and was openly and clearly throwing both of us under the bus. * * * Apparently neither one of us know[s] what we are doing in her eyes." Gallinger also heard about Nash's conduct from two of her staff members, who relayed that Nash made disparaging remarks about District 10, how they did things in the district, and about Gallinger. In particular, they reported that Nash made disparaging remarks about Nevins in front of approximately 30 people at the supervisor meeting.

13. In approximately mid-April 2013, several employees approached Nash with a group request to change their work schedule from eight hours for five days to ten hours for four days. Nash, who generally supported the employees' proposal, forwarded the request to Gallinger and Carey. Gallinger was offended that Nash had not come to her first, to get her advice about the employees' request. Gallinger had "wonderment" over how Nash was a participant in the request. Gallinger did not think that Nash had enough history working at the branch or recognize the importance of having enough coverage throughout the week. Because of Nash's involvement in the employees' request, Gallinger thought that Nash was not unified with the management team and "was going off track and colluding with the staff." As a result, on April 16, Gallinger e-mailed Nash and instructed her to write the following letter separately to each of the six employees:

> "Thank you for your submission of a request to work an alternate work schedule. Please note, we must follow the Union Contract regarding these requests. This request cannot be approved. An individual must submit their own request for an alternate work schedule. Please refer to Article 90.1, Section 3(a), 1-4. Also, please note Article 90.1, Section 3(b) regarding the process for multiple requests. Thanks, Carrie."

On April 16, Nash responded with an e-mail to Gallinger, and a copy to Carey. Nash stated, "I am not opposed to their requests, so I am confused about what you are asking me to do. If you and [Carey] are denying this, that is your choice, but I am uncomfortable being your scapegoat . . . sorry."

On April 17, Carey e-mailed Nash, "I am not sure what to make of your e-mail. Can you either take off a bit early today and come by the Admin, or come by on your way to Bend in the morning so we can discuss it?"

Later on April 17, Nash responded that she had scheduling conflicts, but stated that her concern was regarding how she was being made the bad guy when she did not disagree with the employees' request. She added, "[i]f they didn't follow the contract (however petty that seems) why don't you or [Gallinger] tell them? I actually thought they put a ton of effort and consideration into the request."

14. On Monday, April 29, 2013, Gallinger met with Nash to discuss her actions at the quarterly supervisors meeting. Gallinger informed Nash what she had heard about Nash's conduct, including her use of profanity, her use of her iPhone, and her disrespectful comments made about agency partners. Nash conceded the conduct and accepted responsibility. She assured Gallinger that she would not engage in such conduct in the future.

15. Notwithstanding her meeting with Nash, a few days later, on Thursday, May 2, 2013, Gallinger went further and issued a letter of reprimand to Nash, specifying three incidents.[2]

> "On April 16, 2013, you violated the DAS 50.010.03, and DHS-060-038, Maintaining a Professional Workplace Policy, as demonstrated by your responding to my direction to take an action related to responding to a request for an alternative schedule/s, in a perceived disrespectful and unprofessional manner. You wrote, 'I am not opposed to their requests, so I am confused about what you are asking me to do. If you and [Carey] are

[2]Carey explained that with respect to disciplinary actions, he expects his program managers to come to their own decision. Accordingly, we conclude that the action was the result of Gallinger's views and sensitivities. Nevertheless, Carey stated that they mutually issued the letter because they were no longer able to contain the conduct within the District. Carey had two concerns. He believed that the consultants, on whom the district relies, were part of the people denigrated, which interfered with their work. Additionally, he considered Nash's e-mail of April 16 to be "a little bit over the top in the terms of being disrespectful." Carey defines professionalism as the way we look, act, and speak in terms of securing the respect of the agency's community partners.

> denying this, that is your choice, but I am uncomfortable being your scapegoat.'
>
> "On April 17, 2013, you violated the DAS 50.010.03, and DHS-060-038, Maintaining a Professional Workplace Policy, as demonstrated by your sending me an email that I perceived to be disrespectful and unprofessional: '[w]hen was I going to find out about the mandatory OSM training? I'm sitting at the quarterly feeling like an idiot : (''.
>
> "On April 17, 2013, you violated the DAS 50.010.03, and DHS-060-038, Maintaining a Professional Workplace Policy, as reported by SB and as demonstrated by your making the following statements in the Quarterly Managers meeting: 'I know how to get them to fucking show up[,]' 'they need to do their fucking job[,]' and 'consultants aren't accountable.'

"DAS policy states: Examples of inappropriate workplace behavior include but are not limited to, comments or behaviors of an individual or group that disparage, demean or show disrespect for another employee, a manager, a subordinate, a customer, a contractor or a visitor in the workplace.

"SUMMARY:

"In summary, you as a DHS manager have a responsibility to mentor staff and to personally act in a manner that best demonstrates appropriate communication and interactions between employees in the work environment.

"Your failure to be respectful in your communications does not best demonstrate the standards of DHS and are worthy of this sanction.

"Failure to correct these deficiencies and show sustained improvement will lead to further discipline up to, and including removal from your management role and/or dismissal from [S]tate service." (Paragraph enumeration omitted.)

16. On June 4, 2013, Gallinger and Carey gave Nash her annual performance review, covering August 31, 2012 to May 30, 2013. Other than the letter of reprimand, Nash met or exceeded expectations. The performance review stated that Nash "has taken this disciplinary action very seriously and has made adjustments to her behavior accordingly." The evaluation contains no negative comments, but states that

> "Carrie understands the agency mission, regarding child safety and providing quality services. Carrie makes herself available to her staff and strives to provide sound and thoughtful consultation and directives. She understands the legal aspects of Child Welfare work and comprehends complex case planning. Carrie is a hard worker, and is organized and efficient in her daily tasks. Carrie keeps good records of her meetings with staff and the management team.

"She conducts weekly unit meetings in order to maintain good communications and consistent practice within her unit. Also, Carrie is a very supportive supervisor. * * * Carrie participates fully in management meetings and makes a positive impact on branch operations as well. * * * She readily accepts work and claims the duties of supervising within the branch. At times, Carrie is called upon to cover another due to a supervisor absence. She does this extra work with a good attitude and the same thoughtfulness she gives to her own staff. This supervisor approaches work calmly and in a matter-of-fact manner. She does not show negative emotion towards the work even under times of stress.

"* * * * *

"Carrie is very committed to her profession and working in the Deschutes Branch. * * * [S]he is making efforts to excel at being a [protective services] supervisor. Her interest is in case planning and assisting caseworkers in the best service delivery possible. In addition, Carrie represents our agency at the bi-weekly Multi-Disciplinary Team for Deschutes County. Carrie is complimented for her participation on the Team as well as being prepared to discuss any cases on the meeting's agenda. Her staff find[s] her to be reliable, knowledgeable, easy going and trustworthy.

"Carrie is very committed to her staff and advocates for them, whenever necessary. She thinks positively about people and will assist staff to help them be successful. Also, Carrie will hold her staff accountable. * * * This helps this District be a consistent management team. Carrie is a relational person and she finds positive attributes in her fellow managers and the staff within this branch. Carrie is responsive to meeting timelines." (Italics omitted.)

Technology Policies

17. DHS policy DHS-070-004 sets out policies on acceptable use of information-related technology. The overview of the policy provides as follows:

"**Description**: This policy outlines acceptable uses of DHS information-related technology. This includes, but is not limited to, all present and future forms of hardware, software, and services for data processing, and office automation (including e-mail, networks, Internet, printers, and other computing devices and applications).

"* * * * *

"**Applicability**: All individuals who have been granted access to DHS information-related technology or systems * * * are covered by this policy and shall comply with this and associated policies, procedures, and guidelines.

"**Failure to Comply**: Failure to comply with this policy and associated policies, standards, guidelines, and procedures may result in disciplinary action up to and including dismissal from state service." (Bold in original.)

The general policy provides that DHS is entitled "to trace, review, audit, access, intercept, block, restrict, screen, delete, recover, restore, publish, or disclose any information, in accordance with applicable disclosure of information polices."

The personal use policy provides, in pertinent part:

"a. Personal use of DHS technology is permitted on a limited basis for incidental purposes.

"A. Inappropriate examples: Uses requiring substantial expenditures of time, uses for profit, or uses that would otherwise violate DHS policy.

"B. Appropriate examples: Limited Web searches for personal research, self-study, and preparing a resume or application for a state job.

"b. DHS has sole discretion to determine whether a use is personal or business or if it is incidental use.

"* * * * *

"d. Any personal use:

"A. Must conform to other sections of this policy.

"B. Must take place during rest or meal breaks.

"i. Not allowed before, after, or during work.

"ii. Exception: Incidental, personal use of e-mail is permitted outside of breaks.

"* * * * *

"f. <u>Uses must reflect the department image</u>. Uses do not all have to be formal; but they must be professional.

"g. <u>Uses must be lawful and inoffensive</u>. Uses of DHS systems must not be false, unlawful, offensive, or disruptive.

"A. Unless DHS duty requires it, <u>no use shall contain profanity, vulgarity, sexual content, or character slurs. No use shall make inappropriate reference to race, age, gender, sexual orientation,</u>

religious or political beliefs, national origin, health or disability." (Emphasis added.)

18. Another policy, DHS-070-010, concerns instant messaging, but Nash did not see that policy until June 2014, after she was terminated.[3]

Letter of Reprimand in Lieu of Suspension: December 2, 2013

19. Brock Wallace, who spent 18 years in law enforcement and public safety with Western Oregon University, is currently an internal investigator for DHS and works out of the human resources office in Salem. He is responsible for investigating employee conduct, including incidents and allegations relating to employee use of computers, employee fraud, sexual harassment and discrimination. On October 17, 2013, Wallace was assigned to look into allegations concerning inappropriate behaviors and practices of the District 10 management. Wallace interviewed 17 individuals, including Nash.

20. As part of the investigation, Wallace examined the e-mail accounts of all of the District managers and supervisors, including Nash. The audit of Nash's account produced a large volume of e-mail messages that Wallace considered inappropriate. He was particularly concerned about the type of attachments that Nash was forwarding to the recipients of her e-mail messages. He was further concerned that she was sending inappropriate e-mail communications to represented or non-supervisory staff. Nash also forwarded a large number of e-mails that she received on to other managers and represented staff, including, as a small sample, the following:

"• 'I want to like people, but they're just so fucking stupid'
"• 'SHITSHITSHITSHITSHITSHITSHITSHIT'
"• 'If you have a problem with me please write it nicely on a piece of paper, put it in an envelope, fold it up and shove it up your ass'
"• 'If someone hates you for no reason, give that motherfucker a reason."
"• 'I can eat a bowl of alphabet soup and shit a better argument than that'
"• 'I hate people that say 'He's a nice person once you get to know him.' They might as well just say 'He's a dickhead, but you'll get used to it.'
"• 'Before you diagnose yourself with depression or low self-esteem, first make sure you are not, in fact, just surrounded by assholes.'"

Wallace also produced a large number of e-mails sent by Nash to other managers or represented staff members that specifically made reference to certain managers or represented employees, including, as an example, where Nash referred to a staff member, "[g]ood grief...what a fucking brown noser"; where Nash discussed a staff member, "sorry, looks like [staff member] fucked up again"; where Nash referred to a previous co-manager, "[w]hat is wrong with her? * * * Seriously! She bugs me and I only know her from her annoying ass emails"; where Nash

[3]There is a question whether Nash was given notice or knew of the instant messaging policies. However, DHS asserts that there was no need to find that Nash's conduct violated the instant message policies, DHS-070-010, because her conduct violated the overall information-related technology policies. As Nash was not disciplined for violating the instant messaging policy, we need not address when she was given notice of or knew of that policy.

referred to another district manager, who informed his staff they can lower the flag to honor a slain police officer,

> "'What a dickhead . . . really?! You couldn't lower it without an email from the gov? I am pretty sure Dr. John would have been okay with lowering the flag in [Oregon City] earlier than the rest of the state . . . he is such a fucker . . . oh and * * * don't call him 'our OCPD[ ] colleague' you didn't fucking know him or respect him, you asshole!!!!!'"

Responding to another email on a different matter Nash wrote: "[t]his is fucking ridiculous! I am so so so sorry your upper management sucks ☹."

21. Wallace now initiated a second investigation, which focused specifically on Nash and her e-mail communications. He first examined her personnel file and discovered that she had been given a letter of reprimand in May 2013 for violating the professional workplace policy. Wallace scheduled a fact finding interview with Nash for two reasons. He wanted to interview her with respect to the climate in the district and then to talk with her about her e-mails. Before setting up the fact finding with Nash, Wallace informed Gallinger that he had found inappropriate e-mails and that he was going to meet with Nash about the matter.

22. The fact finding interview was held on November 21, 2013. During the meeting, Wallace first asked Nash questions concerning the climate in the District. Specifically, Wallace asked Nash: (1) "What do you feel is the general atmosphere in the district regarding district management/leadership?" (2) "How do you personally feel things are going with the district management to include the district manager and program managers?" and (3) "Are you aware of any specific issues we should know about?"

Wallace next questioned Nash about her e-mails. During this portion of the meeting, Wallace reviewed the large volume of e-mails sent or forwarded by Nash that had been obtained from the audit of her e-mails. Nash was taken aback about the issue because she considered them to be personal e-mails, but then acknowledged that the e-mails that she sent or forwarded were inappropriate.

Wallace also questioned Nash about DHS and DAS policies. Nash acknowledged that she knew the professional workplace policy and the information technology policy; that she trained staff on policy and procedures, and that was part of her duties; that she knew that she needed to be professional and respectful in the workplace; and that she needed to be professional and respectful through her written communications. Nash understood the seriousness of the matter and at the end of the interview acknowledged that the communications were inappropriate.

23. After the fact finding interview with Nash, Wallace met with McGee, senior human resources manager for DHS, and recommended that Nash be given a one-week, unpaid suspension. He made this recommendation based on (a) the severity of the conduct; (b) Nash's previous written reprimand; and (c) comments that demeaned a district manager, other supervisors, and represented staff. McGee then consulted with Gallinger and Carey concerning the discipline of Nash. Gallinger and Carey urged that McGee give Nash a letter of reprimand, in lieu of a suspension without pay.

24. On December 2, 2013, McGee gave Nash a reprimand in lieu of one-week suspension without pay for sending e-mail messages to others that demeaned and disrespected a DHS district manager and other represented staff members; for calling a district manager "a dickhead, fucker, and an asshole"; and writing about staff, "why are they wasting my time," "[s]hut the fuck up," "she bugs me and I only know her from her annoying ass emails," "[s]orry – [l]ooks like * * * fucked up again," and "[g]ood grief . . . what a fucking brown noser."

The letter stated that her conduct violated DAS Policy 50.010.03, Maintaining a Professional Workplace, and cited in particular:

> "It is the policy of Oregon state government that mutual respect between and among managers, employees, temporary employees and volunteers is integral to the efficient conduct of business. All individuals work together to create and maintain a work environment that is respectful, professional and free from inappropriate workplace behavior.
>
> "Inappropriate Workplace Behavior: Unwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state, or results in the erosion of employee morale and is not associated with an employee's protected class status. <u>Examples of inappropriate workplace behavior include but are not limited to, comments, actions or behaviors of an individual or group that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee, a manager, a subordinate, a volunteer, a customer, a contractor or a visitor in the workplace</u>." (Emphasis added.)

The letter also stated that her conduct violated DHS policy DHS-070-004, Acceptable Use of Information Related Technology Policy, and cited in particular:

> "Section 1 (f) – Uses must reflect the department image. Uses do not all have to be formal; but they must be professional.
>
> "Section 1 (g)(A) – Uses must be lawful and inoffensive. Unless DHS duty requires it, <u>no use shall contain profanity, vulgarity[,] sexual content, or character slurs</u>.
>
> "Section 5 (d)(P) – Must not include creating, sending, or forwarding junk mail or chain letters." (Emphasis added.)

25. DAS Policy 70.000.02(1), Management Service Discipline and Removal, provides the following steps of progressive discipline for a management employee: (a) reprimand; (b) salary reduction of one or more steps for a period of time necessary to improve and monitor improvement of the conduct or performance; (c) reprimand in lieu of salary reduction (represents a level of discipline equal to a salary reduction but does not, due to the employee's Fair Labor Standards Act exempt status, impose an economic sanction); (d) suspension without pay; (e) demotion with a commensurate, permanent reduction in salary when an appropriate vacancy exists at a lower level; and (f) removal from management service and restored to the classified service, if the employee

has immediate prior classified service, or terminated when the employee did not have immediate prior classified service.

Such actions may be taken if the employee is found to be "unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. The reasons for such discipline may be deficient performance or conduct (including acts or omissions on or off the job), which affect the employee's suitability for the management service position."

DAS Policy 70.000.02(2) defines misconduct as "conduct an employee knows, or should know, is not proper behavior"; inefficiency as the "failure to produce required results even though the employee is competent to do so"; incompetence as the "absence of the ability or qualifications to perform required tasks"; insubordination as a "refusal to obey an order or directive"; indolence as "behavior indicating an unwillingness to work"; malfeasance as "conduct showing moral turpitude, such as the commission of an act which is morally wrong and unlawful"; and other unfitness to render effective service as "any other employee conduct, quality or condition which tends to interfere with an agency in fulfillment of its mission or that justifies the agency questioning whether it should continue to employ the employee[.]"

26. DAS Policy 50.010.03, Maintaining a Professional Workplace, states that, "[i]t is the policy of the Oregon state government that mutual respect between and among managers, employees, temporary employees and volunteers is integral to the efficient conduct of business. All individuals work together to create and maintain a work environment that is respectful, professional and free from inappropriate workplace behavior."

DAS Policy 50.010.03 defines inappropriate workplace behavior as "[u]nwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state, or results in the erosion of employee morale and is not associated with an employee's protected class status."

Conflict of Interest Case

27. DHS works with several community partners, which may be public or private entities, such as law enforcement, counsellors, physicians or medical institutions, or non-governmental organizations. One of District 10's community partners is a child advocacy center that serves central and eastern Oregon. That center conducts child abuse assessments and forensic interviews, and runs educational and counseling programs concerning child abuse prevention. During an investigation of child abuse allegations, many of the children will be seen by the child advocacy center for an abuse assessment. This involves an interview and physical examination. There is ongoing coordination and cooperation between DHS, law enforcement, and the child advocacy center to assess and determine whether there has been child abuse. As the supervisor for the protective service unit, Nash has regular and ongoing contact with the child advocacy center. Nash also represented the agency as a member of a multi-disciplinary team, which also included medical resources/facilities, schools, and mental health organizations. The team is chaired by JJ, who is the director of the child advocacy center.[4]

[4]At the request and agreement of the parties, and with the approval of the ALJ, certain individuals are identified only by various initials.

28. On December 16, 2013, a case of alleged child neglect was reported, involving a claim that an intoxicated parent drove with children in the vehicle. The case involved the spouse and children of JJ. After conducting an initial interview with the two parents, the caseworker spoke with Nash, who was her supervisor. Nash also spoke with JJ. Both the caseworker and Nash are very familiar with JJ. Nash then designated the case as "sensitive," which means that the case can only be viewed by a small, select group of relevant DHS staff members. The case file is otherwise closed to, and could not be accessed by, the other staff members and agency partners. Supervisors and managers have authority to "sensitize" cases.

29. There are no written rules or policies that would guide caseworkers or supervisors to bring certain defined case situations to the attention of the program managers or the district manager. There are no written rules or policies that define or set out what treatment should be given or applied to certain defined case situations by the caseworkers, supervisors, program managers, or district manager.[5]

30. Notwithstanding the lack of any written rules or policies, Gallinger claims that it was not appropriate for this particular case to be handled in the branch office. She claims that when a case is brought that involves someone well known to the staff or with whom the staff may have an association, or someone who presents a conflict of interest, the procedure is for the staff member to go directly to Gallinger or to their supervisor, who then goes to Gallinger with the case. Gallinger then makes a determination if the case presents a conflict of interest. She decides what appropriate action is necessary, such as transferring the case to someone who could handle it without bias or to another office or agency. This would remove any possibility of bias, whether negative and positive, from impacting the handling of the case.

31. Nash did not bring the case to Gallinger's attention. Gallinger claims that had she been made aware of this case, she would have removed it from the branch office and would have consulted with Carey about transferring the case outside of the district for an assessment. For her part, Nash acknowledged to have most likely erred by not alerting Gallinger. However, Nash explained more credibly that, based on the practices in the district, nothing different would have occurred had she alerted Gallinger to the case; that it was not inappropriate to assign the case to the particular caseworker because that individual was leaving DHS and had the lowest caseload; that the caseworker handled the case "by the book"; that the case would not have been assessed or treated any differently had Nash alerted Gallinger; that the outcome would not have been any different; that JJ was not given any special treatment; and that the case was determined "founded" and thus sent to the review committee.

32. Notwithstanding the importance that Gallinger asserted that she placed on the matter, neither she nor Carey discussed the matter with Nash after they discovered the incident. In

[5]The DHS policy concerning conflicts of interest is set out in DHS-060-002, and "covers professional relationships, client and patient relationships, outside employment, board or commission memberships, expert witness activities, honoraria, gifts, and the use of information gained from employment with DHS for personal gain." These rules, however, do not appear to provide any relevant application to the JJ case.

fact, no one discussed the matter with Nash until the fact finding interview with Wallace on February 19, 2014.[6]

Termination: March 20, 2014

33. After Nash's letter of reprimand of December 2, 2013, Wallace continued to examine Nash's e-mail account. He found no further activities or communications that he considered inappropriate.

However, beginning December 3, 2013, Wallace initiated an audit of Nash's State instant messaging (IM) account.[7] He audited the IM account from December 3, 2013, to February 4, 2014. The IM audit revealed that Nash continued to make disrespectful and demeaning references to coworkers. In communications to other employees, as an example, Nash commented on her supervisor's "bitchiness" and referred to two coworkers as having "BIG mouth[s]." She stated to a male staff member that another employee "said to stop being a cunt and get over here," and responded "will do!" when that employee said "tell [the male staff member] he's a douche." Nash discussed her supervisor's possible retirement, and said, "not soon enuf!" "omg . . . did I say that out loud?" "it's a secret . . . but she turns 58 in [A]pril and is supposed to retire then . . . we aren't allowed to tell anyone tho." Nash referred to a former employee, saying "the last guy I hired sexually harassed someone * * * and I had to dump him from trial services!" She continued, he "went out after training with a group of people and touched two girls['] tits . . . nice . . . he's lucky he wasn't prosecuted," and "he's married too." On February 4, 2014, Nash discussed Christmas gifts from a community partner organization, saying "you mean Christmas gifts?", "ys . . nice job * * * !!!!," "how embarrassing . . . I said to keep them until next year . . . it's so late now," "DUH."

34. Wallace arranged for another fact finding interview with Nash, and informed Gallinger he would be coming to the branch to meet with Nash about the matter.

35. Before Wallace interviewed Nash, on January 27, 2014, Carey wrote McGee about the latest issue he came across. Carey described the conflict of interest case (which has been described above). Carey informed McGee that a particular child welfare assessment case came to Nash as a supervisor. The case involved the spouse of the director of an outside agency that is a partner with DHS. Because DHS works with this person, the case should have been considered as having a conflict of interest and assigned to another DHS unit for assessment. Carey concluded, "[l]et me know if you need any additional information. This, to me, is another example of very poor judgment. I wouldn't even have known about it except by chance."

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[6]It would appear to be a misnomer to label Wallace's February 19 interrogation of Nash regarding the conflict of interest issue as a fact finding interview. It appears clear that Wallace had already concluded that Nash had improperly handled the JJ case when he began to ask questions. Interestingly, Wallace failed, contrary to his earlier interrogation regarding the other issues, to establish or review the appropriate policies and practices with respect to handling such or similar cases in District 10 or in the Department. No policies or practices were established or revealed by his investigation or fact finding.

[7]An audit of the IM account is forward looking, meaning that it collects and records the messages sent by the employee beginning on the date that the audit is initiated. It does not retrieve past messages.

36. Wallace conducted a fact finding interview with Nash on February 19, 2014.[8] Gallinger was also present. Wallace began by explaining that he was gathering information concerning an allegation of inappropriate use of the IM system, violation of maintaining a professional workplace policy, use of information-related technology, and her decisions related to the conflict of interest case. He added that if it is found that she engaged in inappropriate conduct in violation of and outside DHS policies and the DHS's reasonable expectations for conduct of its managers, then she could be disciplined, including dismissal from State service.

Wallace conducted a detailed re-examination of the May and December 2013 letters of reprimand, asking Nash to acknowledge each of the various issues that resulted in her previous reprimands. Wallace asked Nash to re-admit things that she conceded in the November 2013 fact finding interview and to concede to certain implications of her letters of reprimand. After asking Nash approximately 70 questions concerning her prior conduct, her obligations, and the implications of her prior discipline, Wallace then proceeded to ask Nash about some instant messages that were gained from an audit of her IM account. He recited Nash's IM statements and after each one he asked whether it was an appropriate or professional statement or whether it was an appropriate use of the IM system. Nash conceded that they were not professional or appropriate.

37. Wallace, who was responsible for finding the allegedly inappropriate e-mails, initiating the complaint, and then investigating the complaint, recommended that Nash be terminated. He concluded that her behavior had not changed, only her mode of behavior. On March 11, 2014, McGee held a pre-removal meeting or interview with Nash. This meeting was intended to give Nash notice of the grounds for her dismissal and an opportunity to present any evidence or factors to mitigate the offense or discipline.

38. On March 20, 2014, McGee dismissed Nash from State service under ORS 240.555 (misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance, or other unfitness to render effective service).

In the termination letter, Nash was charged with the following offenses: (a) failure to follow policy DAS 50.010.03 (Maintaining a Professional Workplace); (b) failure to follow policy DHS-070-004 (Acceptable Use of Information Related Technology Policy); (c) lack of sound professional judgment; and (d) violation of the public trust.

The letter of termination issued by McGee asserts that Nash "sent instant messages to others that demeaned and disrespected DHS managers and represented staff[,]" and that Nash's "communications were not professional and respectful." McGee lists the following statements as violations of DAS Policy 50.010.03:

> "You referred to Ms. [AB], your program manager, with 'and her bitchiness.' You also made the comment that she was retiring and it was not soon enough. You then followed this up with 'omg . . . did I say that out loud?'
>
> "You referred to Ms. [CD] as having a 'BIG mouth.'

[8]See n 6.

"You referred to [EF] as having a big mouth.

"You wrote to Mr. [GH] and told him '[JK] said to stop being a cunt.' You continued your conversation with Mr. [GH] referring to 'cuntiness' several times. You said you would pass on to Mr. [LM] that Mr. [GH] said he is a douche.

"You referred to Ms. [NP] as 'stupid bitch.'

"You referred to Mr. [RS], [a senior manager] as 'but you know [RS] . . . softie for the sex people.'

"You referred to [a community partner] in a sarcastic manner when discussing Christmas gifts they provided to DHS. This conversation was done with a represented staff member.

"You were aware other DHS staff including supervisors and represented staff were violating this policy and you failed to report these violations."

39. DHS policy DHS-070-004, Acceptable Use of Information Related Technology Policy, in pertinent part, states:

"Section 1 (f) – Uses must reflect the departmental image. Uses do not all have to be formal; but they must be professional.

"Section 1 (g)(A) – Uses must be lawful and inoffensive. Unless DHS duty requires it, no use shall contain profanity, vulgarity[,] sexual content, or character slurs."

The letter of termination issued by McGee asserts that Nash's "use of the DHS instant message system was less than professional and respectful. You used the system to demean DHS management and represented staff. You used profanity in your communications as well." McGee further asserted that "[y]ou were aware other DHS staff including supervisors and represented staff were violating this policy and you failed to report these violations."

40. McGee also charged Nash with lacking sound professional judgment.

"You displayed poor judgment when you sent the instant messages that contained profanities and demeaning remarks against DHS Managers and DHS represented staff.

"You displayed poor judgment when you failed to report other DHS [M]anagers and represented staff for violations of DHS policies when they communicated with you in an unprofessional and disrespectful manner about others.

"You displayed poor judgment when you failed to notify your program manager and the district manager of a conflict of interest when you chose to have your

employee work a case with a partner of DHS whom you work with weekly. You chose not to talk with them about the case when JJ asked you not to discuss the case with anyone because JJ was embarrassed. You failed to understand this was a conflict of interest situation and you should not have been making decisions on the case due to your professional connection with JJ."

41. Lastly, McGee charged Nash with violation of the public trust.

"Your actions and behaviors with your unprofessional and disrespectful comments through the use of the DHS/State of Oregon IM system were outside of DHS Policies and Procedures and the reasonable expectations DHS has of its managers.

"You were aware that other DHS managers and represented employees used the state computer system for use that was against DHS policies and you failed to report them for these violations. As a Manager you did not step forward at any point to address these violations.

"This is outside of the public's expectations of managers within DHS. The public, as well as DHS, has the right to expect that DHS managers will conduct their own behaviors with themselves and DHS staff within the guidelines set forth in policy. A lesser standard for DHS managers violates the public trust and DHS' credibility with the communities to which DHS provides services."

Discipline of Other Employees

42. On March 5, 2014, after an investigation and fact finding interview, Gallinger gave AG, who engaged in communications with Nash, a letter of expectation concerning the proper use of State resources, including the instant messaging program.[9]

43. On March 6, 2014, after an investigation and fact finding interview, JF, who is a represented employee in the Oregon City Child Welfare Office, received a letter of reprimand from Gayla May, a supervisor in Clackamas County, for making the following statements during an IM conversation with Nash on December 20, 2013: "[m]y cuntiness is what keeps me in Clackamas, obviously." "Cuntiness is a word because it appears in my lexicon." "The whole fucking day is long as shit." "I'm having a retard moment …" and "[t]ell [JK] he's a douche."

44. Also on March 6, 2014, after an investigation and fact finding interview, Gayla May gave JS, who engaged in communications with Nash, a letter of expectation on professional conduct in the workplace. The letter stated:

"It is the policy of DHS to provide a work environment free from behavior, action, or language, which is inappropriate for our professional workplace. It is important

[9]Although the Department asserts that letters of expectation are not discipline, they are placed in the employee's personnel file, and appear to be consulted and considered when imposing subsequent discipline on the employee.

that our workplace is free from unacceptable behavior that may violate human dignity, diminish morale, affect productivity, or create a hostile work climate.

"Although it may not be your intent, your behavior through the IM system was inappropriate with comments about your staff and the use of abbreviations for profanity.

"My expectation is, while you are in the workplace, you will treat your staff, coworkers and other DHS staff members in a professional and respectful manner through your in person and written communications.

"My expectation is that you continue to establish and keep collaborative working relationships with your staff, coworkers, clients, and managers while taking an active role in improving the office culture through positive and appropriate interactions."

45. After an investigation and fact finding interview, on March 14, 2014, TY, who is a supervisor in the Oregon Child Welfare Office, received a letter of reprimand for inappropriate e-mail communications with Nash and for not reporting Nash's inappropriate comments. TY was charged with not reporting the following incidents:

"• You forwarding communications you had sent to Mr. Jerry Buzzard, District Manager, and Ms. Kim Keller, Program Manager[,] regarding a child fatality in your district to Ms. Nash in another district with the following statement 'Still no response.'

"• You forwarding communications you had sent to Mr. Jerry Buzzard, District Manager, and Ms. Kim Keller, Program Manager[,] regarding the Oregon City Police Officer death to Ms. Nash in another district with the following statement 'No response.' Ms. Nash responded to your sending this to her with 'This really fucking pisses me off . . . and they wonder why morale is at an all-time low ☹.'

"• You forwarding communications you had sent to Mr. Jerry Buzzard, District Manager, Ms. Kim Keller, Program Manager, and Mr. Dave [F]lock regarding the lowering of the flag for the Oregon City Police Officer to Ms. Nash in another district. Ms. Nash responded to your sending this to her with 'Why didn't Jerry just go out and fucking lower the flag. . . I am still not understanding this one . . .'

"• You forwarding communications you had sent to Ms. Kim Keller, Program Manager[,] regarding staff and the arranging of assistance for the Oregon City Police Department to Ms. Nash in another district. Ms. Nash responded to your sending this to her with 'Is this from Kim? Wow, so caring and affectionate . . why not just say nothing at all . . . it would have stung less ☹.'

"• You forwarding communications from Mr. Jerry Buzzard, District Manager, announcing that the flags could be lowered to Ms. Nash in another district. Ms. Nash responded to your sending this to her with '[w]hat a dickhead. . . really?! You couldn't lower it without an email from the gov? I am pretty sure Dr. John would have been okay with lowering the flag in [Oregon City] earlier than the rest of the state . . . he is such a fucker. . oh Jerry . . . don't call him 'our OCPD colleague' you didn't fucking know him or respect him, you asshole!!!!!'

"• You commented with 'Lol' to Ms. Nash when she wrote to you 'What is wrong with her?' in regards to an email Ms. Putnam had sent. Ms. Nash responded to your comment with 'Seriously! She bugs me and I only know her from her annoying ass emails. . .'"

46. The decision to give letters of expectation or written reprimands, however, was made by staff at the office of human resources at DHS and not by the management in the respective districts. The letters were then prepared by staff at the office of human resources to be issued in the name of a local manager.

47. On May 31, 2013, Nash gave a letter of expectation to employee JW in which Nash brought the obligations of DAS Policy 50.010.03, Maintaining a Professional Workplace policies to JW's attention. Nash specifically stated that she expected JW to "exhibit professional and respectful conduct in your communications with agency clients and fellow State employees."

On November 25, 2013, Nash gave employee KM a letter of expectation in which Nash brought it to KM's that KM needed to maintain "appropriate interactions and communication with agency clients, community partners, and/or your fellow State employees and DHS management." In the letter, Nash stated that she expected KM to "exhibit professional and respectful conduct in your interactions and/or communications"; that KM was to "refrain from using profanity in the workplace"; that KM was not to share "comments and/or information that a reasonable person might consider mean spirited"; and that KM was not to use state electronic technology for non-work related issues (other than what is provided for in the accepted use of information technology policies).

CONCLUSIONS OF LAW

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

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

3. Nash's dismissal from State service did not violate ORS 240.570(5) or 240.555.

DISCUSSION

On March 20, 2014, the Department dismissed Nash 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 asserts that Nash: (1) failed to maintain a professional workplace in violation of DAS Policy 50.010.03, based on the subject and content of her electronic communications with other DHS employees; (2) engaged in unacceptable use of information-related technology in violation of DHS-070-004, based on the subject and content of her electronic communications with other DHS employees; (3) demonstrated a lack of sound professional judgment based on her electronic communications with other DHS employees and on her handling of the purported conflict of interest case; and (4) violated the public trust.

Legal Standards

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." Under ORS 240.570(5), a management service employee "with immediate prior former regular status in the classified service 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." ORS 240.555 provides that an employee may be disciplined and dismissed for "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service." Under this statutory scheme, and because Nash had status as a classified service employee immediately before she was promoted to management service, we will consider two separate personnel actions: (1) her removal from management service under ORS 240.570(3); and (2) her dismissal from State service under ORS 240.570(5) and 240.555. *See Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12-13 (April 2013).[10]

The Department has the burden of proving both the removal from management service and the dismissal from state service. OAR 115-045-0030(6); *Zaman* at 12; *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). The Department meets that burden of proof if this Board determines that under all of the circumstances the Department's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Zaman* at 12. We have defined a reasonable employer as one that "disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee's length of service and service record * * *." *Zaman* at 12; *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001), citing to *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-52 (1986). A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. *Zaman* at 12. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures. *Id.*

[10]The Department's letter does not specifically remove Nash from management service, but rather dismisses her from State service. In such cases, dismissal from State service necessarily involves removal from management service, and we, therefore, do not require that the grounds for removal be separately stated. *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22 (July 2010) (citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 27-28 (July 2006), *recons*, (September 2006).

We apply a two-step analysis in reviewing the Department's actions. First, this Board determines whether the employer has proven the charges that are the basis of the discipline. *Id.* However, the employer need not establish all of the charges. *Ahlstrom* at 15. If we find that the State has proven any of the charges, we then apply a reasonable employer standard to determine whether the State was justified in imposing the disciplinary action that it did. *Greenwood* at 30.

First Step: Reasons for Removal from Management Service

The Department charged Nash with violating DAS Policy 50.010.03 (Maintaining a Professional Workplace) when she sent electronic communications and messages to other DHS employees that were disrespectful, derogatory, and demeaning toward DHS managers and represented staff. DAS Policy 50.010.03 proscribes "conduct or behavior that causes a negative impact or disruption to the workplace or business of the state, or results in the erosion of employee morale. The policy considers as inappropriate any "comments, actions or behaviors * * * that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee, a manager, a subordinate, a volunteer, a customer, or contractor or visitor." Under the policy, an employee who has "engaged in inappropriate workplace behavior * * * may be subject to discipline, up to and including dismissal." Further, the policy requires supervisors, such as Nash, to "address inappropriate behavior they observe."

The Department also charged Nash with engaging in electronic communications that constituted an unacceptable use of information-related technology in violation of DHS-070-004 (1)(f) and (g)(A). The Department charged her with using profanity and demeaning DHS managers and staff. Under (1)(f), all communications using DHS's information-related technology, which includes e-mails and instant messaging, "must be professional." Section (1)(g)(A) prohibits electronic communications "contain[ing] profanity, vulgarity, sexual content, or character slurs."

The Department also charged Nash with poor judgment when she sent the instant messages that contained profanities and demeaning remarks against DHS Managers and DHS represented staff, and that she further exercised poor judgment when she failed to report other DHS managers and represented staff for violating DHS policies when they communicated with her in "an unprofessional and disrespectful manner about others."

The Department established that Nash used DHS information-related technology to engage in non-employment communications with other DHS employees, and that the communications contained crude profanity and derogatory, disparaging, and ridiculing comments about certain DHS employees. There is no dispute that Nash sent the electronic communications at issue. Further, Nash acknowledged her understanding of the pertinent DHS and DAS policies, and that the electronic communications were in contravention of the applicable rules and policies. In fact, Nash conceded at each step of the disciplinary process, and at the hearing, that her communications with other DHS employees were disrespectful, inappropriate, and unprofessional.

The Department charged Nash with poor judgment when she failed to notify her program manager and district manager over a purported conflict of interest involving a case that had connections with a DHS partner. The Department asserted that Nash failed to understand that this

situation created a conflict of interest and that she should not have been making decisions on this case. However, although Nash did not bring the matter to the attention of her program manager or district manager, she did designate the case "sensitive," which limited staff access to the file. Moreover, the Department offered no written or otherwise specifically expressed rule that defined employees' obligations when faced with a case involving possible associations with community partners. Nor did the Department establish that there was a universal practice of taking such cases to the program manager or the district manager for transfer to another jurisdiction. It appears to be a policy understood and unilaterally expected by only the program manager or district manager. The policy was not clearly communicated to Nash. Without that understanding of the policy, Nash chose to "sensitize" the case in order to ensure that only a few relevant staff had access to the case. Further, upon discovering Nash's conduct, the district manager did not bring the matter to Nash's attention, but instead reported it to McGee because the district manager knew that human resources was investigating Nash. Under these circumstances, we do not conclude that the Department established that Nash exercised poor judgment in her handling of this matter.

Lastly, the Department charged Nash with violating the public trust based on her conduct contained within the other charges. As a result, this charge is merely derivative and presents no additional or new allegation of specific misconduct or policy violations by Nash, and we do not consider it.

Second Step: Reasonable Employer Standard

Because the Department has proven some of its charges, our next step is to "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); *Greenwood* at 28. In applying this standard in management service discipline cases, an employer may hold a management service employee to very strict standards of behavior, as long as the standards are not arbitrary or unreasonable. *Zaman* at 15. The "employer's burden in justifying a removal from management service is relatively minor." *Id.* A significant factor in our analysis of management service employee discipline 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. *Id.*

In the instant case, it has been established that Nash, a supervisor who had trained other employees on the policies at issue, was sufficiently knowledgeable of the rules and policies that she breached. She also readily acknowledged (and the record establishes) the seriousness of her conduct; that is, that her communications were disrespectful, inappropriate, and unprofessional, and violated the professional workplace and technology-use policies.

The charges set out in Nash's termination letter of March 20, 2014, cannot be viewed in isolation, but must be considered in the context of her previous conduct and discipline. After Nash transferred to District 10, Gallinger specifically spoke to her about her language and conduct, reminding Nash that she serves as a role model for other employees. Gallinger counselled Nash on occasion for her unprofessional and disrespectful language in the workplace, including profanity. In May 2013, Gallinger gave Nash a letter of reprimand for violating professional workplace

policies. At that time, Nash was charged with (a) sending Gallinger a disrespectful and unprofessional e-mail that effectively challenged Gallinger; (b) challenging Gallinger and Carey over the employees' scheduling requests; and (c) making profane and derogatory comments about employees and DHS consultants. Gallinger and Carey concluded that Nash had violated DAS Policy 50.010.03 and DHS-060-038. In the letter of reprimand, Nash was admonished that "[f]ailure to correct these deficiencies and show sustained improvement will lead to further discipline up to, and including removal from your management role and/or dismissal from [S]tate service." On December 2, Nash received a second letter of reprimand (in lieu of suspension) for sending e-mail communications that demeaned and disrespected a manager and other staff, and for making profane references to a district manager and other Department employees. Her conduct violated the Department's professional workplace policy and policies concerning acceptable use of the Department's information-related technology.

Instead of ceasing her conduct, Nash continued the proscribed communications. She changed from e-mail to instant messaging and then continued her inappropriate and unprofessional communications. The nature of her communications, however, did not change. Although the Department took her employment record and service into account, the Department nevertheless concluded that Nash, notwithstanding her previous reprimands, "chose to find a way to still communicate through DHS systems in the same manner." Despite counselling and two disciplinary actions, Nash continued to behave in the same inappropriate and unprofessional manner, and continued to misuse the information related technology. She merely altered her method of communication, from public expression to e-mailing to instant messaging. Under these circumstances, we conclude that Nash was unable or unwilling to fully and faithfully perform the duties of her management position satisfactorily, and that the Department acted as a reasonable employer in removing her from management service.[11] *See also Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992) (the Board sustained the removal of an employee from management services where the employee made crude comments about another employee's sexual activities and referred to another employee as "bitchy"); *Dickey v. State of Oregon, Department of Corrections, Oregon State Penitentiary*, Case No. MA-8-08 (May 2009) (the Board sustained discipline where a manager used an agency computer to send derogatory comments about other agency employees that were considered to be inappropriate and unprofessional); *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994) (employer had cause to remove manager for making sexually suggestive comments).

Dismissal from State Service

Next, we consider whether the dismissal of Nash from State service was contrary to ORS 240.555, which permits the State to dismiss a classified employee with immediate prior former regular status only for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance, "or other unfitness to render effective service." Specifically, the Department asserts that Nash was dismissed for misconduct, insubordination, and that she was unfit to render effective service.

[11]Indeed, Nash no longer pursues the argument that removal from management service was inappropriate; rather, she pursues only the dismissal from state service.

As we noted above, "misconduct" requires a "transgression of some established and definite rule of action * * * *willful in character*, improper or wrong behavior." *Mabe* at 26 (emphasis in original). Further, the conduct must involve intentional wrongdoing in order to meet the definition of misconduct under ORS 240.055. *Greenwood* at 30.

Nash contends that she did not engage in misconduct because her actions did not involve intentional wrongdoing. Specifically, Nash contends that she believed that the instant messages that she sent were "private" and not proscribed by the Department's policies. We disagree with that contention. To begin, regardless of Nash's belief that her instant messages were "private," those messages were sent by way of the Department's information-related technology.[12] The Department's policies with respect to employee use of such technology required that all messages "be professional" and not "contain profanity, vulgarity, sexual content or character slurs." The record firmly establishes that Nash's instant messages used the Department's information-related technology to send messages that violated these policies. The record also establishes that Nash was aware of these policies and, significantly, had just been disciplined for engaging in nearly identical conduct.

Moreover, the Department's "professional-workplace" policy proscribes "conduct or behavior that causes a negative impact or disruption to the workplace or business of the state, or results in the erosion of employee morale." The policy also forbids "comments, actions or behaviors * * * that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee, a manager, a subordinate, a volunteer, a customer, or contractor or visitor." There is little doubt that Nash's instant messages, regardless of the medium employed, violated this policy. Again, the record strongly establishes Nash's familiarity with this policy, and that Nash had quite recently been disciplined for similar misconduct.

Thus, we disagree with Nash's contention that her actions were not "willful." To the contrary, we conclude that Nash was aware of the pertinent policies and intentionally sent the intended messages. That is sufficient to establish misconduct.[13]

As set forth above, 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

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[12]Moreover, the Department had just disabused Nash of the erroneous belief that messages sent by way of the Department's information-related technology were "private." Specifically, Nash offered up this same defense regarding her e-mail communications, and the Department informed her otherwise.

[13]Although not necessary to uphold the Department's decision to dismiss Nash from state service, we also agree that Nash's conduct demonstrates an unfitness to render *effective* service. Simply put, although Nash is likely able to perform the "technical" duties of her former classified job, the record demonstrates an unlikelihood that she would refrain from the type of conduct that resulted in her dismissal, which would be required for Nash to render effective service.

We do not conclude, however, that Nash's actions constituted "insubordination," which requires a refusal to obey a direct and lawful order. *See Greenwood* at 32. As set forth above, Nash's actions, willfully violating a workplace policy, are more akin to "misconduct" than an immediate and staunch refusal to obey a superior's direct order. Although the distinction between the two may be nuanced, there is nevertheless a distinction.

principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or if the employee's behavior probably will not be improved through progressive measures. Here, we conclude that the Department satisfied these standards. The Department did not summarily dismiss Nash when she first engaged in the type of misconduct that resulted in her dismissal. Rather, considering her length of service and service record, the Department issued a reprimand (in lieu of suspension), with the warning that future similar conduct could result in dismissal. Notwithstanding that warning, Nash almost immediately engaged in nearly identical misconduct. That Nash squandered the opportunity to improve her behavior does not mean that she was never provided with it.

In sum, we conclude that the Department acted as an objectively reasonable employer in dismissing Nash from state service. Therefore, we will dismiss the appeal.

ORDER

1. Nash's appeal of her removal from management is dismissed.

2. Nash's appeal of her dismissal from State service is dismissed.

DATED this 24 day of December, 2014.

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482

*Member Weyand Concurring in Part, Dissenting in Part

I agree with my colleagues that DHS properly removed Nash from management service, as she engaged in misconduct that demonstrated that she was unfit or unwilling to perform the duties expected of a *management service* employee. However, I do not agree that Nash's misconduct was so egregious that it was reasonable for DHS to skip the final steps of progressive discipline and remove Nash from State service altogether.

To the contrary, I believe that Nash's excellent record of service is a strong mitigating factor that DHS should have taken more fully into account when assessing what level of discipline

to impose. Nash worked for DHS for sixteen years in an emotionally challenging field. During this time, she had an "exemplary and unblemished record as a child welfare worker," and was promoted twice. Nash consistently exceeded expectations in her performance appraisals while receiving positive feedback and effusive praise from both her colleagues and community partners. Until the year preceding her termination, Nash had never been disciplined by DHS. Moreover, Nash had modified and improved her behavior after the prior reprimands, albeit insufficiently, demonstrating a willingness to change and improve her behavior with lower levels of discipline. Thus, while it is a close call, I believe that a reasonable employer would have returned Nash to the classified service rather than removing her from State service.

For these reasons, I would reverse this aspect of DHS's decision and order Nash reinstated to the classified service position she held prior to her promotion to management service.

Jason M. Weyand, Member