EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-6-03

(MANAGEMENT SERVICE REMOVAL)

PAMELA S. NASS, Appellant, v. STATE OF OREGON, EMPLOYMENT DEPARTMENT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Board heard oral argument on November 19, 2003 on Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) Vickie Stilley-Cowan on September 10, 2003, following a hearing on March 28, April 16, and May 23, 2003, in Salem, Oregon. The hearing closed on June 10, 2003, upon receipt of the parties' post-hearing briefs.

Sharon C. Stevens, Attorney at Law, Callahan & Stevens, 5845 Shoreview Lane N., Suite 500, P.O. Box 20937, Keizer, Oregon 97307-0937, represented Appellant.

Joseph Haddad, Attorney at Law, Fisher & Phillips, 1001 S.W. 5th Avenue, Suite 1600, Portland, Oregon 97204, represented Respondent at hearing. Tessa M. Sugahara, Assistant Attorney General, Department of Justice, 1162 Court St. N.E., Salem, Oregon 97301-4096, represented Respondent at oral argument.

On February 19, 2003, the State of Oregon, Employment Department (Department) removed[1] Appellant Pamela Nass from management service for allegedly releasing confidential Department information and being untruthful during the investigation of the allegation. Nass timely appealed her removal on February 28, 2003.

The issue presented for hearing was whether the Department removed Appellant from management service in violation of ORS 240.570(3). For the reasons that follow, we conclude the removal was unlawful.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. Nass has been employed by the Department in various management service positions since November 1987. From July 1999 until her removal, Nass worked as a recruitment officer for the Department. She was classified as a Human Resource (HR) Analyst 2. One of her responsibilities was recruitment for the Department and the screening of job applications.

2. Mary Jo Henderson is the manager for the Department's Office of Human Resources and was Nass's supervisor. Henderson reports to Assistant Director Sheryl Warren. Warren reports to Deputy Director Greg Hickman, who in turn reports to Director Debbie Lincoln.

3. Warren has been the Assistant Director for the Department since February 2002. Prior to her employment with the Department, Warren worked in HR for the Department of Consumer and Business Services (DCBS).

4. In early 2002, Henderson heard concerns from the Department's Diversity Council[2] that persons of color were under-represented in the Department. Some individuals felt that the screening process was too rigid. Nass screened the majority of the applications in the Department. As a result of these concerns, Henderson reviewed rejected applications. She identified several rejected applicants she felt met the minimum standards for a position, and others she believed could meet minimum standards if the applications contained additional information. Henderson contacted

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[1]Because Appellant is a management service employee with no prior classified service, her removal is, in effect, the same as dismissing her from State service.

[2]The Diversity Council has since been disbanded.

some of the rejected applicants and encouraged them to reapply. Henderson gave some of these applications to Nass for her follow-up.

5. When Nass was following up on the stack of applications from Henderson, she noticed that those who were asked to resubmit their applications were all people of color. Nass became concerned that Henderson might be giving preferential treatment to applicants of color. She voiced her concern to two of her higher-ranking coworkers, Vicki Tucker and Gene Schutz.[3] They encouraged her to speak with Warren.

6. Nass went to speak with Warren about her concerns. Warren was not in her office, so Nass spoke with Warren's secretary, Donna Gould, about her concerns. It is common practice for employees to tell Gould the reason for wanting to meet with Warren. Gould asked Nass if she wanted to set up a meeting with Warren. Nass said no because she decided to first do some further investigation. Gould reported the conversation to Warren.

7. Warren told Henderson about the concerns Nass had raised. Henderson called Nass into her office. Henderson said she heard a rumor that Nass was telling employees that Henderson was giving preferential treatment to people of color.[4] Henderson then asked Nass whether she had spoken to anyone about her concerns. Nass responded that she had spoken with her coworkers Tucker and Schutz. Henderson was very upset with Nass and subsequently contacted a lawyer about suing Nass. Neither Warren nor Henderson asked Nass if she had spoken with Gould.[5]

8. Later, Nass called Gould and asked whether she had talked to Warren or anyone else about their conversation. Gould lied and told Nass that she had not spoken to Warren or anyone else.[6]

9. The following day, Warren asked Nass what caused her to believe Henderson might be giving preferential treatment to applicants of color. Nass responded that Henderson had given her several applications which Nass had previously

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[3]Tucker was the acting assistant human resource manager. Warren established that it was reasonable for Nass to consult her higher-ranking coworkers about her concerns.

[4]Both Henderson and Warren initially testified that they could not remember from whom or how they heard this rumor. Henderson later testified she heard it from Deidre Cattrell.

[5]Nass testified that she did not say Gould's name because she assumed that Gould had told Warren since Warren was in the meeting with her and Henderson.

[6]Gould later told Warren that she had panicked and lied to Nass about not having talked to Warren.

determined did not meet the minimum qualifications. Henderson expressed her belief that these applicants could meet the minimum qualifications if they were given an opportunity to amend their applications. When Nass reviewed those applications, it appeared that all of the applicants were people of color. Nass made copies of some of the applications the previous day but did not complete the task. She intended to copy the remaining applications the following morning. However, when she and Warren went to retrieve the applications, they were gone. Either Henderson had taken them home with her while she was on medical leave, or else someone had removed the post-it notes Henderson placed on the applications, and they could no longer be identified from among all of the other applications in the office.

10. Warren and Nass concluded that there was insufficient evidence to confirm Nass's suspicions. Warren did not investigate to determine whether the subject applications were exclusively from people of color.

11. On or about April 3, 2002, Warren wrote a memo to Nass regarding the application evaluation process. Warren's memo further expressed concerns about Nass's communication with applicants and her perceived overly rigid screening of applicants. The memo also stated that the previous Director was chastised by a member of the legislature because of Nass's handling of an application from a legislative assistant. As a result, Henderson had been directed to review all of Nass's rejected applications. The memo was not disciplinary and was not placed in Nass's personnel file.

12. On or about April 12, 2002, Nass responded to Warren's memo. Nass was unaware that the prior director had been chastised and she was also unaware that this incident was the reason Henderson was reviewing the rejected applications. Nass explained the incident. She rejected an application because it was submitted past the filing deadline. The applicant, who worked for a legislator, came into the office to confront her at the same time she was leaving the office for a dentist appointment. She explained to the applicant that she would discuss the situation when she returned. He got angry and went to the director's office. When Nass returned, Henderson told her to accept the application and make sure the applicant was on the list before the hiring manager began the interview process. Nass complied. She was not informed of the reason for the change.

With regard to the application review process, Nass explained that she felt she could not go directly to Henderson because the concerns involved Henderson, who was her supervisor. Therefore, she went to her coworkers in confidence and asked their

assistance in helping her determine whether she should approach Warren with her concerns. Nass committed to take any future concerns directly to Warren.[7]

13. In the fall of 2002, Nass applied for an assistant HR position within the Department. Because of the potential for a conflict of interest, the Department forwarded the applications to DCBS for grading. Gould collected the applications and forwarded them to DCBS. Gould informed Nass who the other applicants were.[8]

14. DCBS determined that Nass did not qualify for the position. Nass was embarrassed by the rejection.

15. In the fall of 2002, M.R., HR assistant manager for DCBS, applied for the position of manager of the Department's McMinnville field office. Nass, as the Department's recruitment officer, reviewed M.R.'s application to determine whether he met the minimum qualifications for the position and graded his answers to the questions that accompanied the application. Nass gave M.R. a score high enough to meet the minimum qualifications, but not high enough for him to receive an interview. Nass entered M.R.'s information into JAPI, a computer database used to store and retrieve information about applications for employment in the State's executive branch. M.R. subsequently appealed his score.

16. Most HR officers in the State's executive branch have access to JAPI.[9] JAPI can be used to identify all persons who have applied for a particular position and to identify all positions for which a person has applied.

17. On or about December 19, 2002, Nass attended the monthly meeting of the Oregon State Personnel Management Association (OSPMA), a professional organization open to state HR managers and officers. HR employees regularly share confidential hiring information with other HR employees in the normal course of business. HR employees sometimes share confidential information with their colleagues at OSPMA meetings. Everyone was expected to keep the confidences.

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[7]Shortly after this incident, Henderson invited all female Department employees, with the exception of Nass, to a social event. Henderson told the other employees not to tell Nass about the event.

[8]There is no evidence to suggest that Gould was disciplined or otherwise corrected for revealing information to Nass about who had applied for the position.

[9]DCBS and the Employment Department are part of the Executive Department.

18. Gayle Young, an HR Analyst for DCBS, also attended the December 19 OSPMA meeting.[10] She knew Nass and sat next to her at the meeting. In a conversation between Nass and Young, Young expressed a concern that some DCBS employees may be leaving her office for other jobs. Nass asked whether Young was aware that someone from DCBS had applied with the Department. Young asked who had applied. Nass said that M.R. had applied for a manager position with the Department's McMinnville field office, but that his scores prevented him from getting an interview. She told Young that M.R. had appealed his scores and that his application was being reviewed. Young said she was not surprised because there had been rumors in the office that M.R was considering other jobs.

Nass also told Young that she (Nass) had applied for an assistant manager position within the Department, and that DCBS (Young's agency) had reviewed her application and determined that she did not meet the minimum qualifications. Nass was embarrassed by her rejection and asked Young not to say anything.[11]

19. M.R. was Young's supervisor at DCBS. Prior to attending the OSPMA meeting, Young's coworker, John Hills, told her that M.R. was looking for another job. After Nass confirmed this fact, Young informed Hills who subsequently told M.R. what Young had heard from Nass. Young believed that the information about M.R.'s application was confidential. Young was not counseled or disciplined for passing on this information about M.R.'s application.

20. In late December 2002, Henderson reviewed M.R.'s application and gave him a much higher score. Henderson invited M.R. to lunch to discuss any interest he might have in working for the Department. During their conversation at lunch on

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[10]Young had been employed as an HR analyst with DCBS since October 2000.

[11]Nass and Young were the only witnesses to the OSPMA conversation. It occurred on December 19, 2002. The Department questioned Young about it for the first time no earlier than December 27, 2002. It did not question Nass until January 8, 2003. Not surprisingly, neither could recall the exact words of the conversation. Young was adamant that Nass asked her not to repeat the information about M.R. Nass was equally adamant in denying this allegation. Nass testified that she asked Young not to mention her own (Nass's) rejected application.

Both witnesses seem credible on this point. We believe there was a communication mix-up, and that both honestly reported what they understood the conversation to mean. Nass asked Young not to tell anyone. Young understood Nass to be referring to the information Nass gave about M.R. Nass in fact was referring to her own unsuccessful application.

December 27, 2002, M.R. informed Henderson that Nass had told Young about his application.[12]

21. When Henderson returned to her office, she told Warren what M.R. had divulged. Warren instructed Henderson to contact Young. Henderson called Young. Young said Nass had informed her about M.R.'s application with the Department and told her not to tell anyone. Henderson did not know Young and never met with Young in person.

22. Henderson called Nass into her office and asked if Nass had told anyone from DCBS about M.R.'s application. Nass said she had talked with Judy Westenhouse.[13] Henderson said that Westenhouse was not the name she heard about.[14] Nass then said she spoke with Young at the OSPMA meeting. Henderson asked Nass if she had told Young not to tell anyone about the conversation. Nass said she had not. Nass then asked Henderson if it was a big deal that she had told Young. Henderson told Nass that she would get back to her and then dismissed Nass from her office.[15]

23. On or about January 10, 2003, Henderson gave Nass a pre-removal letter. The grounds given for potential removal were mismanaging confidential information, misrepresenting the facts in an effort to deflect responsibility, and evading accountability.

24. Nass was surprised by the pre-removal letter. She told Henderson that she did not think she violated any rule or policy regarding confidentiality. Nass said she had on prior occasions looked up application information for managers who wanted to know if someone was on a list. She also knew of others who disclosed confidential information but who did not lose their jobs. Nass told Henderson that she thought the disclosure was permissible because she was a confidential personnel employee sharing

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[12]M.R. was subsequently directly appointed to an assistant human resource manager position for the Department, bypassing the open competitive process.

[13]Westenhouse was the contact person at DCBS. Nass informed her that M.R.'s scores had been changed, and that he would be getting an interview. There is no allegation that this conversation was inappropriate.

[14]At hearing, Henderson testified that during her conversation with Nass, she could not remember Young's name, despite having just spoken with her.

[15]There were no witnesses to this conversation.

information with another confidential personnel employee in a personnel environment and that Young could have looked up the information for herself on JAPI.[16]

25. Managers sometimes request HR staff to tell them who has applied for a position, what positions a particular individual may have applied for, and whether the individual met the minimum qualifications. Most HR staff can access this information from JAPI.

26. There is no rule or policy prohibiting HR employees from sharing recruitment information with other HR employees.[17] Similarly, there was no rule or policy that prohibits HR employees from accessing JAPI. Nass has never been verbally informed that disclosure of recruitment information to another HR employee was a violation of confidentiality.[18]

CONCLUSIONS OF LAW

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

2. The Department removed Nass from management service in violation of ORS 240.570(3).

ORS 240.570(3) allows the State to remove an employee from management service "if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily."

One focus of the statute is on the performance of "duties." The statute does not define what those duties are. It is up to the State to establish the duties of its employees, and for management service employees, the required standards of behavior can be strict. *Jones v. Department of Transportation Highway Division,* Case No. MA-6-87

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[16]There were no witnesses to this conversation.

[17]Assistant HR Manager Mary Jo Sikorra stated: "It's like the any damn fool rule"—employees should know better.

[18]The Department relies on minutes of two HR team meetings to establish the existence of the confidentiality rule it asserts. The minutes deal with securing confidential documents in the work area. They do not address the propriety of an HR employee giving information to another HR employee in a different State agency. In addition, the Department has a handbook devoted to confidentiality. Neither party asserts that the handbook addresses the circumstances at issue here.

(May 1989) at 17. The State's authority is not, however, unfettered. Its actions must be objectively reasonable. *Morisette v. Children's Services Division,* Case No. 1410 (March 1983). We have frequently held that a reasonable employer defines performance expectations and expresses those expectations clearly to its employees. *Ash v. State of Oregon, Department of Transportation,* Case No. MA-21-98 (June 2000) at 8, *AWOP* 184 Or App 226, 56 P3d 968 (2002); *Stark v. Mental Health Division,* Case No. MA-17-86 (April 1989) at 36.

The Department removed Nass because she allegedly revealed confidential information and then lied during the investigation of the incident. The Department has the burden of proving its allegations. Board Rule 115-45-030.

We begin with the alleged disclosure of confidential information. There is no dispute that Nass told Young about M.R.'s application. Nass candidly admitted this fact. The question then is whether Nass knew, or should have known, that this action violated a reasonable performance expectation, policy, rule, or law.

The Department maintains that Nass had an obligation not to divulge to an HR manager from another agency that M.R. had applied for a position with the Department. The Department has failed to establish the source of this obligation. There is no written rule or policy prohibiting Nass's conduct. Instead, the Department argues that "any damn fool should know better."

We agree that some rules of workplace conduct are so basic and universally known that they need not be contained in a written rule or expressly stated as a job expectation. *Stark, supra* at 40; *Smith v. State of Oregon, Department of Transportation,* Case No. MA-4-01 (June 2001) at 10. For example, there is no need to inform employees that they cannot steal from the employer or punch their boss.

Based on this record, the nondisclosure requirement the Department seeks to enforce is not such a rule. It does not strike us as so obvious that there is no need to articulate an expectation that an HR manager in one State agency may not disclose personnel information to an HR manager in another State agency, especially when the disclosed information is otherwise available to both parties through a computer program. The burden is on the employer to make its rules and expectations clear. *Ash* and *Stark,* both *supra*. The Department failed to do so here.[19]

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[19]To be clear, we do *not* hold that the Department is prohibited from adopting the type of nondisclosure rule it asserts here. This case is not about the content of the rule or its reasonableness. Indeed, such a rule seems to fall well within the range of reasonableness within which the State and its agencies operate. The focus instead is on the Department's obligation

(continued...)

The contradictory evidence in the record further highlights the fact that the Department's expectations on this issue were unclear to employees. Some personnel employees testified that it is common to exchange confidential information with personnel employees from different agencies. Others testified that such an exchange is permissible in most circumstances, but not this one.

Further, there are two specific instances in the record which indicate that other employees were also unaware of the purported rule. In one, Department employee Gould told Nass the names of everyone who applied for a position in which Nass was interested. In the second, an HR manager revealed the same information that forms a basis for Nass's removal. After Nass told Young about M.R.'s application, Young then repeated the information to her coworker Hills. These incidents further demonstrate that the standard the Department asserts was not well known to employees.

The Department asserts that the primary reason it removed Nass is because she lied. Nass admits she asked Young not to tell anyone. Young understood the statement to mean that she should not tell anyone about M.R.'s application. Nass contends she meant that Young should not tell anyone about *Nass's* application. There were no witnesses to this conversation, nor was there any other reliable evidence corroborating either party's rendition of this conversation. It appears there was a miscommunication, and that each party honestly reported what she understood the conversation to mean. In previous cases when we were faced with equally persuasive evidence, we ruled against the party with the burden of proof. *Fairview Hospital v. Stanton*, 28 Or App 643, 560 P2d 667 (1977). Here, that party is the Department.

The Department relies on two other earlier incidents to bolster its decision to remove Nass. The first incident involved a legislative assistant who submitted an untimely application. Nass, in accordance with Department rules, rejected the application. The director of the Department was chastised by a legislator for this incident. Nass was not counseled or disciplined for rejecting the application.

The second incident arose out of Nass's concern that Henderson, her supervisor, may have been giving preference in the application process to people of color. Nass's concerns were not investigated, nor was she disciplined. The Department presumes that Nass lied because when asked, Nass failed to mention Gould's name as a person to whom she spoke about her concerns. In the year that passed between this incident and Nass's removal, the Department never questioned Nass about this oversight

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[19](...continued)
to make the rule known before it can remove or otherwise discipline an employee for violating it.

or confronted her about it. In fact, the Department never mentioned the incident until this action.

In any event, the Department failed to carry its burden of proving that Nass lied. Nass candidly revealed the names of the others to whom she spoke about her concerns. We can conceive of no advantage Nass would gain from withholding Gould's name while revealing the names of the others. Her otherwise candid response and her lack of a motive to lie indicates she was truthful. We credit Nass's explanation that she failed to mention Gould because she believed her supervisors already knew she had spoken to Gould.

Although the cause necessary to remove a management service employee is less than that required to support a similar sanction against a classified employee, in both instances the employer's actions must be objectively reasonable. *Brown v. Oregon College of Education,* 52 Or App 251, 628 P2d 410 (1981); and *Morisette v. Children's Services Division,* Case No. 1410 (March 1983). The Department has not met this standard and has failed to prove its allegations. We will therefore set aside the removal.

ORDER

The Department shall rescind Nass's removal from management service, immediately reinstate Nass to her former position, and make Nass whole for any loss of pay and benefits caused by her removal.

DATED this 13th day of February 2004.

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.