EO: Intrastate
BYE: 05-Oct-2024

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

643
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0734

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 21, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0004230156). The employer filed a timely request for hearing. On September 11, 2024, ALJ Nyberg conducted a hearing, and on September 27, 2024, issued Order No. 24-UI-267542, reversing decision # L0004230156 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective October 1, 2023. On October 15, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Given the large size of the exhibit the employer offered into evidence, EAB has, for ease of reference, marked the exhibit with page numbers. The parties may request a copy of the page-numbered exhibit by contacting EAB.

WRITTEN ARGUMENT: Both parties filed written arguments which contained information that was not part of the hearing record. OAR 471-041-0090 (May 13, 2019) states, in relevant part:

> (1) Except as stated in this rule, information not received into the hearing record will not be considered on review.
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> * * *
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> (b) Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that:

(A) The additional evidence is relevant and material to EAB's determination, and

(B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record.

The employer's written argument consisted of three separate documents or collections of documents totaling 60 pages, including a cover letter from the employer's counsel. The cover letter suggested that these documents, many of which are not part of the hearing record, "were not available to the [employer] at the time of [the] September 11, 2024, hearing." Employer's Written Argument at 1.

The first portion of the employer's argument, relating to allegations that claimant had committed perjury during his divorce proceedings, includes an investigation report from the Oregon State Police regarding those allegations, documents in support of the allegations, and a September 13, 2024, cover letter from the Coos County District Attorney that was enclosed with the delivery of these materials to the employer. The investigation itself appears to have commenced in or around early July 2024, after the district attorney referred the matter to the state police, and concluded with an August 6, 2024, report authored by a state police detective. It is not clear when, if at all, the employer requested a copy of the investigation report, or why the district attorney did not send it to them until September 13, 2024. Nevertheless, it appears that the employer had no opportunity to review the report until after the hearing. As such, the employer has shown that they were prevented from offering into the hearing record the materials pertaining to the alleged perjury due to factors or circumstances beyond their reasonable control. Further, allegations of perjury, if founded, could call into question the credibility of claimant's testimony, and therefore are relevant and material to EAB's determination. As such, the employer's request for EAB to consider additional evidence relating to allegations that claimant committed perjury during his divorce proceedings is allowed.

However, the evidence relating to the allegations of perjury are of limited probative value. The matter was first reported to the district attorney by the father of claimant's ex-wife, following what the record suggests was a contentious and difficult divorce.[1] Employer's Written Argument at 7. The investigation report did not substantiate the allegations that claimant had committed perjury, and declined to pursue any action against claimant. Employer's Written Argument at 12. The investigating detective's findings were mixed, concluding that some of the allegations did not amount to perjury, while suggesting that others could amount to perjury *if* additional evidence were obtained, but that those alleged offenses were beyond the statute of limitations and therefore could not be prosecuted. There is no indication in these materials that claimant was ever actually charged with perjury, let alone prosecuted or convicted.

In sum, claimant's father-in-law's hearsay allegations that claimant committed perjury were not substantiated. Therefore, although EAB has considered this additional evidence when reaching this decision, the evidence is not sufficient to diminish the credibility of claimant's testimony.

The next portion of the employer's written argument consists of a document entitled "Secondary Examination of Disciplinary Action of [claimant]," dated September 7, 2024. Employer's Written Argument at 22. This 11-page document is prefaced with an explanation that it "is to serve as a resource

[1] *See*, e.g., Exhibit 1 at 138, describing the situation in claimant's February 7, 2022, employee evaluation as an "exceptionally volatile divorce [in] which his former wife has weaponized his employment as a Police Officer against him."

for considerations to potentially reconsider the disciplinary actions taken against [claimant] by [the employer].” Employer’s Written Argument at 22. For practical purposes, however, the document is essentially a recitation of the employer’s arguments relating to claimant’s alleged violations of the employer’s expectations prior to his discharge. The vast majority of this information is already contained within the employer’s extensive exhibits submitted into the hearing record. To the extent that some of the information in this document was not contained within the hearing record or otherwise considered in the first portion of the employer’s written argument, above, the employer did not assert or show that the information was not available at the time of hearing. As such, the employer did not establish that they were prevented from offering any such new information into the hearing record due to factors or circumstances beyond their reasonable control.

The final portion of the employer’s argument consists of a 28-page review and analysis of claimant’s hearing testimony, authored by claimant’s former direct supervisor. The analysis included several pieces of new information, apparently drawn from the employer’s records, which purported to cast doubt on the veracity of claimant’s testimony. Here again, the employer did not assert or show that they were prevented from offering any such new information into the hearing record due to factors or circumstances beyond their reasonable control.

Therefore, under OAR 471-041-0090, EAB did not consider this additional information in the second and third portions of the employer’s written argument when reaching this decision. EAB considered these portions of the employer’s written argument to the extent they were based on the record, including the employer’s assertions that the record itself shows that claimant was not a credible witness.

EAB considered claimant’s argument on the merits. However, claimant’s argument largely raised procedural issues outside the scope of the merits. Claimant expressed concern that the employer was permitted to appeal the administrative decision in this matter, issued on May 21, 2024, when he had originally been allowed benefits based on the same work separation in January 2024. Claimant’s Written Argument at 1–2. This echoed concerns that claimant raised at hearing, prior to the start of testimony. *See* Audio Record at 8:20 to 9:50.

Department records show that this work separation was originally adjudicated in or around January 2024, and that the Department allowed claimant benefits without issuing a formal written decision on the matter. A further review of Department records suggests that the Department issued the January 2024 decision informally (and therefore without a grant of appeal rights to the parties) because they had not received a timely written response from the employer pursuant to ORS 657.267(4), which otherwise would have entitled the employer to appeal rights. Department records further suggest that the Department later found that the employer actually had filed a timely written response, thus entitling them to appeal rights, and that the Department was therefore required to issue a formal decision that allowed the parties the right to appeal it.[2] As such, decision # L0004230156 was correctly issued, and the ALJ likewise correctly proceeded to the merits of the case based on the employer’s request for hearing on decision # L0004230156. Audio Record at 10:13.

[2] EAB has taken notice of these facts, which contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

FINDINGS OF FACT: (1) The City of Coquille employed claimant as a patrol officer with the employer's police department from approximately 2017 until October 4, 2023.

(2) The employer maintained extensive policies regarding the conduct of their law enforcement officers. Regarding requirements that their officers conduct themselves in a truthful manner, those policies included a prohibition on:

a. [The] failure to disclose or misrepresenting material facts, or making any false or misleading statement on any application, examination form, or other official document, report or form, or during the course of any work-related investigation;
b. The falsification of any work-related records, making misleading entries or statements with the intent to deceive or the willful and unauthorized removal, alteration, destruction and/or mutilation of any department record, public record, book, paper or document;
c. [The] failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business; and
d. Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority or official standing of [the employer] or its members.

Exhibit 1 at 166–167.

(3) Regarding requirements for investigations of suspected homicide, the employer's policies included a provision stating, "If the initially assigned officer suspects that the death involves a homicide or other suspicious circumstances, a supervisor shall be notified to determine the possible need for the Major Case Team to respond to the scene for further immediate investigation." Exhibit 1 at 177.

(4) Regarding the treatment of coworkers or members of the public, the employer's policies prohibited "discourteous, disrespectful or discriminatory treatment of any member of the public or any [employee]," "[c]riminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the [employee's] relationship with [the employer]," and "[a]ny other on- or off-duty conduct which any [employee] knows or reasonably should know is unbecoming [of an employee], is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon [the employer or their employees]." Exhibit 1 at 169-170. The employer's policies also prohibited "any act on- or off-duty that brings discredit to [the employer]." Exhibit 1 at 167.

(5) The employer's policies also required officers to "adhere to all applicable laws, orders, regulations, use agreements and training related to the access, use, dissemination and release of protected information." Exhibit 1 at 189. This provision applied to, among other things, officers' use of the National Crime Information Center (NCIC) and Law Enforcement Data System (LEDS) systems and thus required officers to abide by the laws pertaining to the use of those systems.

(6) LEDS, Oregon's state system, included access to records maintained by the Oregon Driver & Motor Vehicle Services (DMV). In relevant part, *former* OAR 257-015-0060 (effective January 3, 2019) outlined specific circumstances in which DMV records may be accessed via LEDS. That version of the rule stated, in relevant part:

(4) Oregon Motor Vehicle and Driver Records:

(a) Oregon motor vehicle registration and driving records are the responsibility of the Oregon Department of Transportation, Driver and Motor Vehicle Services Branch (DMV). Government agencies in Oregon have access to these records via LEDS for authorized criminal justice purposes and for licensing, employment and regulatory purposes specifically authorized by State Law and approved in writing by DMV. Communication, dissemination, or use of this information for other than authorized purposes is prohibited.

(b) Authorized purposes do not include inquiries for the collection of taxes and parking violation fees or fines;

(c) Authorized purposes are specifically defined as follows:

(A) Enforcement of state traffic and criminal laws, and regulations;

(B) Identification of vehicles which have been towed or impounded by police;

(C) Screening of prospective or present agency employees who will have access to LEDS equipment or information;

(D) Identification of vehicles or individuals associated with criminal investigations;

(E) Review of driving and registration records for prosecution and sentencing functions;

(F) Processing of school bus driver applications by the State Department of Education;

(G) Access to vehicle registration information by fire and rescue agencies in emergency situations where waiting for the availability of a law enforcement officer would compound the emergency;

(H) The identification of vehicles or individuals associated with the Weighmaster enforcement function;

(I) Inquiries for licensing, employment and regulatory purposes authorized by State law and approved in writing by DMV.

(d) Inquiries for any purpose other than those specified in paragraphs (4)(c)(A)–(4)(c)(I) of this section must be directed to the department of Transportation, Driver and Motor Vehicle Services Branch (DMV) by telephone or by mail, together with the proper fee or account number. Violations of these policies may result in the suspension or termination of motor vehicle records access.

The employer did not maintain their own policy specifically outlining standards for employees' use of LEDS or NCIC.

(7) Claimant received copies of, and was generally aware of, the above policies and rules. Additionally, claimant participated in numerous trainings on a wide variety of law-enforcement topics during his tenure with the employer.

(8) In April 2022, claimant was involved in a "very hasty [*sic*] divorce and custody matter." Transcript at 37. On or around April 23, 2022, claimant was on duty for the employer when he learned that a custody assessment matter in the divorce required claimant to produce his DMV records and fingerprints within two days. Claimant asked the employer if he could use his paid leave time to leave work and attend to those matters, as the DMV would close prior to the end of his shift. The employer denied his request to use paid leave to go to the DMV before the end of his shift, as claimant was unable to find another officer to cover his shift during his absence. However, the chief of police told claimant to go ahead and pull claimant's own DMV records from LEDS in order to fulfill the requirement of the custody assessment, which he said would be permissible "because that was not a criminal check of [claimant's] records." Transcript at 38. While claimant initially had been concerned about whether using the system in this way was permissible, he pulled his own DMV records from LEDS once given permission from the chief.

(9) At some point in or around 2022, claimant was on patrol when he observed a vehicle with illegally-tinted windows in the parking lot of a grocery store that had closed for the evening. Because of "a problem with a lot of drug users in" claimant's jurisdiction, claimant became concerned that the vehicle was being used in connection with illegal drug activity. Claimant determined that the illegally-tinted windows gave him "reasonable grounds" to run a search for records relating to the vehicle's license plate. Transcript at 54. Claimant was not acquainted with the person to whom the vehicle was registered at that time. A few weeks later, claimant's wife "showed up in that vehicle at a handoff." Transcript at 54. When claimant learned of this development, he reported it to his supervisor.

(10) In July 2022, claimant's supervisor learned that claimant had developed a "'perception' issue" with the county district attorney's office "after numerous complaints… regarding his investigations and interactions with citizens." Exhibit 1 at 256. Claimant's supervisor "discussed the issues" with one particular investigation with claimant, and "discussed the way he is seen by community members and other professionals." Exhibit 1 at 256.

(11) After claimant's divorce was finalized in October 2022, he encountered difficulties with the state's child-support enforcement system. Claimant was ahead on his child-support payments to his ex-wife at the time. However, after they registered with the state's system, the program's office, under the auspices of the Oregon Department of Justice (DOJ), erroneously generated a garnishment document indicating that claimant had fallen behind on his payments. On October 20, 2022, claimant contacted the employer's Human Resources (HR) director to ask if she had received any such document from DOJ, notified her of the error that the DOJ office had made, and explained that he was working to resolve the error to prevent having wages withheld from his paycheck for this purpose. Exhibit 1 at 46. The HR director acknowledged claimant's email the same day.

(12) On October 21, 2022, the HR director notified claimant that she had received "paperwork to withhold Child Support from [claimant's] paycheck starting this pay period." Exhibit 1 at 47. The document was not signed by a judge. Shortly thereafter, claimant responded to the email, in relevant part, "Again, as I was telling you yesterday, please do not get involved. I have yet to establish this and that payment is wrong from what I talk to them. I will let you know next week what we need to do with that." Exhibit 1 at 47. A few minutes after this email, claimant and the HR director spoke on the phone, discussed the matter further, and reached a tentative accord on the matter. Claimant did not believe that he had encouraged the HR director to do anything illegal or unethical, and did not believe that he had come across to her as intimidating. Claimant ultimately was able to resolve the issue before the garnishment ever took effect.

(13) On December 2, 2022, claimant's supervisor counseled claimant in response to two separate concerns about claimant's conduct that arose from a discussion with the county DA's office. The first concern involved a case of child sex abuse that was reported to the employer's station on January 25, 2021. Regarding that concern, the supervisor investigated the circumstances surrounding the call that came in, and found that while claimant had been "assigned the call… he did not respond to the call and instead passed the call" to two other officers to handle. Exhibit 1 at 214. The supervisor concluded that claimant should have handled the call himself in that case. The second concern involved claimant's continued reputation in the DA's office of not investigating cases as thoroughly as he should have, and instances where claimant's body-camera footage could not be used as evidence in criminal cases because the DA felt that claimant's demeanor could "create a favorable or sympathetic view of the suspect by the jury[.]" Exhibit 1 at 216. In response to these concerns, the supervisor created a "corrective action plan" that included five areas in which claimant was expected to improve. None of these areas for improvement included any specifics relating to crime-investigation practices or procedures.

(14) On the evening of December 17, 2022,[3] claimant was on duty when he received a call from dispatch regarding a report of possible domestic harassment or assault which had happened more than an hour prior to the call. The incident involved a woman who had allegedly assaulted her adult daughter. The report had originally been called into the county sheriff's office, but because the sheriff's deputies were both occupied with other incidents, claimant agreed to investigate the matter.

(15) After taking the call, claimant departed for the city's community center, which was the site of the reported incident. When he arrived, the individuals involved in the incident were no longer there. Claimant called the alleged victim (the daughter), who told claimant that after the alleged perpetrator (her mother) had been cut off by the bartender at the venue, her mother began "flailing her arms" in protest as the daughter tried to get her to leave, and "happened to hit the daughter in the face." Transcript at 45. The daughter also told claimant that the two had left the community center and were back at their shared home, which was outside of city limits and therefore within the jurisdiction of the county. With the permission of his supervisor, claimant then travelled to their shared home and interviewed the daughter. During the interview, the daughter told claimant that her mother had been "highly intoxicated and left sleeping in the back seat of a car" near their home, and that the daughter had checked on her and placed a blanket over her shortly prior to claimant's arrival. Transcript at 43.

[3] Claimant's investigation of this matter continued into the early hours of December 18, 2022. For the sake of brevity, however, this decision refers to the matter as having occurred on December 17, 2022.

Claimant noticed at the time that there were no marks on the daughter's face, or any other indications of injuries sustained. Based on the lack of any evidence of injury and the daughter's explanation for her mother's behavior, claimant did not believe there was "probable cause for any crime." Transcript at 44. Claimant also briefly spoke to the alleged assailant's son, who had not been a witness to the events prior to the daughter and mother's return home. Claimant did not formally interview the son because claimant did not believe that he had information that was relevant to the investigation. The father of the family also was home at the time, but claimant did not speak to him because the grandmother of the family, who resided there as well, told claimant that the father was "in the bathroom and highly intoxicated and unable to come to the door." Transcript at 49.

(16) Concerned about the mother's welfare, as the temperature outside was below freezing, claimant went outside to check on her in the car. Prior to doing so, he contacted his dispatch as he was concerned about being out of radio range, and advised them that he expected he would need either backup (if the mother was belligerent) or an ambulance (if she was having a medical emergency). When claimant arrived at the car, he found the mother unresponsive and not breathing, but "still warm." Transcript at 46. Claimant, suspecting that the mother was suffering from positional asphyxia, ran to his vehicle, "immediately requested just an ambulance to respond," and then ran back to the mother's car where he performed CPR for 25 minutes until the ambulance arrived. Transcript at 46.

(17) Both county sheriff deputies arrived shortly after the ambulance. After a brief attempt at resuscitation, an EMT pronounced the mother dead at the scene. Claimant did not contact his supervisor about the matter after he learned that the mother had died. Claimant then walked over to the deputies, who "were already talking about how this was a death investigation," and that they would "be in touch with the medical examiner." Transcript at 47. Claimant told the deputies that he "was their best witness," as he had been at the scene first, and gave them the information he had gathered thus far. Transcript at 47. One of the deputies asked claimant if he had "talked to everybody," and claimant told the deputy that he "had had contact with the brother, grandma, and the sister who called it in, but not the father because he was highly intoxicated." Transcript at 48–49. Claimant ultimately left the scene without further investigating the matter, and the sheriff's department handled the inquiry into the mother's death. Claimant did not believe he was required to continue with the investigation himself, as the initial call had initially been placed to the sheriff's department, and the death occurred in their jurisdiction rather than claimant's. The cause of the mother's death was later determined to be a combination of alcohol poisoning and positional asphyxia.

(18) On January 6, 2023, the employer's HR director sent a letter to the city's administration complaining about claimant's conduct during the October 2022 garnishment matter. In the letter, the HR director raised concerns that claimant had asked her to violate state law and had put the city at risk of liability. Exhibit 1 at 45. The HR director had delayed the filing of a formal complaint in the matter due to claimant and his supervisor both having been out on leave at various points after the October 2022 incident took place.

(19) In response to the HR director's letter, claimant's supervisor initiated an investigation into claimant's work history. In the course of that investigation, the supervisor detailed eight separate complaints about claimant's conduct, including the wage garnishment matter, the December 17, 2022, investigation, and a number of alleged interpersonal conflicts. The investigation also turned up concerns

about claimant's use of the LEDS and NCIC systems. On August 13, 2023, claimant's supervisor completed a report detailing his findings of the investigation.

(20) On or around October 4, 2023, the employer discharged claimant due to their belief that claimant's conduct, as outlined in his supervisor's investigation report, had violated their policies and procedures.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "'[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant in connection with several concerns regarding his demeanor and work performance. The order under review concluded that the employer discharged claimant for "mishandling a suspicious death investigation, misusing law enforcement databases, and intimidating a fellow public employee" regarding a wage garnishment matter. Order No. 24-UI-267542 at 4. The order under review further concluded that claimant's conduct in the first instance did not constitute misconduct, but that his conduct in the second and third instances did. However, the record does not support the conclusion that claimant's behavior in any of these matters amounted to misconduct.

As a preliminary matter, because of the breadth of the employer's investigation into claimant's conduct and the numerous concerns that arose from that investigation, it is necessary to identify which of these concerns were the proximate causes of the employer's decision to discharge claimant. Included in the employer's exhibit is a letter from the employer's city manager, dated October 31, 2023, regarding claimant's discharge. In relevant part, the city manager stated, "[Claimant's] offenses are many, but for the purpose of my decision I am primarily concerned with two of them." Exhibit 1 at 9. The city manager went on to explain that the two concerns that primarily led him to discharge claimant were the "illegal use of the LEDS/NCIC program," and "failure to properly conduct a homicide investigation."[4] Exhibit 1 at 9. The city manager likewise testified at hearing that he would have discharged claimant if these were the only two concerns that the employer had about claimant's conduct. Transcript at 32. Claimant's supervisor testified to the same. Transcript at 21–22. As such, it is reasonable to conclude that these two concerns were the proximate causes of claimant's discharge. The analysis as to whether claimant was discharged for misconduct therefore is primarily focused on them, and not claimant's alleged intimidation of a fellow employee regarding the wage garnishment matter. If the record shows

[4] Although the record does not show that the decedent in the December 17, 2022, investigation was ever ruled a homicide victim, the city manager appeared to be referring to this incident.

that either of the two primary causes of claimant's discharge involved willful or wantonly negligent behavior, the focus would then shift to other incidents of allegedly willful wantonly behavior, including claimant's alleged intimidation of a fellow employee regarding the wage garnishment matter, as necessary to determine whether or not claimant was discharged for misconduct, and not an isolated instance of poor judgment.[5]

The analysis regarding much of claimant's conduct requires weighing the conflicting accounts of the parties. As explained above, EAB considered the employer's additional evidence regarding the allegations that claimant had committed perjury during his divorce proceedings, but that evidence is not of sufficient probative value to diminish claimant's credibility where his account differs from the employer's. EAB has not considered any other additional evidence provided in the employer's or claimant's written arguments. In weighing the parties' conflicting accounts in the sections below, EAB relied solely on evidence in the record, and considered the parties' arguments only to the extent they were based on the record.

Claimant's Use of the LEDS and NCIC Systems. The employer's concerns over claimant's use of the LEDS and NCIC systems centered on two separate instances in which they alleged that claimant had improperly used the systems for personal matters. One of these, occurring in April 2022, involved claimant accessing his own DMV records for use in his divorce proceedings. In that incident, claimant had received short notice of the need to produce those records, was unable to obtain permission to leave work to request them, and could not obtain them after work because the DMV office closed prior to the end of his shift.

OAR 257-015-0060(4)(c) lists the exclusive authorized purposes for accessing DMV records through LEDS. None of these purposes include obtaining one's own records for use in a personal matter. Likewise, OAR 257-015-0060(4)(d) requires that inquiries "for any other purpose" than those listed in the previous subsection "must be directed to the department of Transportation, Driver and Motor Vehicle Services Branch (DMV) by telephone or by mail, together with the proper fee or account number." Thus, in obtaining his own records for a personal matter, claimant violated the administrative rule governing the use of the system. This resulted in claimant having violated the employer's policy requiring him to "adhere to all applicable laws, orders, regulations, use agreements and training related to the access, use, dissemination and release of protected information." However, the record fails to show that in accessing his own DMV records through LEDS, claimant violated the employer's expectations willfully or with wanton negligence.

At hearing, the parties offered conflicting testimony on claimant's decision to obtain his own DMV records. Claimant testified that while he was initially concerned about whether he was permitted to do so, he ultimately did obtain his own records via the LEDS system because the chief of police at the time instructed him to do so. Transcript at 39. Claimant also testified that the chief's office was close to that of claimant's supervisor, and that the supervisor was therefore present when the chief instructed claimant to obtain his records in that fashion. Transcript at 39. In contrast, claimant's supervisor testified that "there was absolutely no way [the employer] would have authorized [claimant] to run [his] own DMV records[,]" and that he did not hear the chief tell claimant to do so. Transcript at 27, 61. The chief of police was no longer working for the employer at the time of the hearing, and did not testify. The

[5] *See* OAR 471-030-0038(3)(b), (1)(d).

record also does not show that the then-chief was interviewed during the employer's investigation of this incident.

Given the conflicting testimony, the evidence as to whether the then-chief of police instructed claimant to pull his own DMV records is equally balanced, as the supervisor's mere assertion that there was "absolutely no way" the chief would have so advised claimant is insufficient to show that claimant's testimony was not credible. Because the evidence is equally balanced, the employer has not met their burden of proof to show that claimant was not so instructed, and the facts have been found accordingly. The employer did not maintain their own policy specifically outlining standards for employees' use of LEDS. Claimant was uncertain whether he was allowed to pull his own DMV records from LEDS, sought help from a superior officer, and relied on the superior officer's instruction to do so. The record fails to show claimant knowingly violated the employer expectations, that he should have known that his conduct probably violated those expectations, or that he was indifferent to the consequences of his actions. The record therefore fails to establish that any violation of the employer's was willful or wantonly negligent.

The other incident involving claimant's use of DMV information obtained from LEDS or NCIC took place in a grocery store parking lot. At hearing, claimant's supervisor testified there were two additional violations of the LEDS usage policies that had occurred: claimant ran a license plate that belonged to a vehicle that his ex-wife had purchased, and in a related incident, claimant ran records checks on persons not associated with any criminal investigations. Transcript at 9. These allegations were not detailed in the employer's exhibits. In contrast with this account, claimant testified to only one similar incident, in which he ran the license plates of a vehicle with illegally-tinted windows in the parking lot of a grocery store that had closed for the evening. Transcript at 54. Claimant further explained that when he ran the vehicle's plates, they were not registered to anybody with whom he was acquainted, but that a few weeks later, his "ex-significant other showed up in that vehicle at a handoff," and that he reported this development to his supervisor. Transcript at 54. To the extent the employer has alleged that other incidents occurred beyond the single incident described by claimant here, they did not provide sufficient detail to meet their burden to show that any other such incidents constituted misconduct.

Furthermore, claimant's account of the event described above is entitled to more weight, as he was a firsthand witness to the event, whereas the supervisor does not appear to have been present at that time. The facts therefore have been found according to claimant's account. Based on that account, the record does not show that claimant violated the employer's policy or applicable administrative rules governing the use of LEDS. Claimant explained at hearing that he ran the vehicle's plates because he was aware of drug activity in the area, and noted that the vehicle had illegally-tinted windows. The record lacks evidence to rebut claimant's account of this incident or show that he was aware at the time of the incident that the vehicle was, or would be, connected to his ex-wife. Therefore, claimant's use of LEDS to obtain DMV information about the vehicle was at least arguably permitted under *former* OAR 257-015-0060(4)(c)(A), which permits usage for "enforcement of state traffic and criminal laws, and regulations."[6] Moreover, claimant testified that when he later learned that his ex-wife was connected

[6] In their written argument, the employer cast doubt on claimant's assertion that he had reason to suspect that the vehicle had been involved in a crime, as the statutes governing window tints (*see generally* ORS 815.221 and ORS 815.222) only apply when a vehicle is being operated, whereas claimant testified that the vehicle was parked. Employer's Written Argument at 51. This is a mischaracterization of claimant's testimony, as cited in the employer's written argument itself: claimant only stated that the vehicle was "in a grocery store parking lot that was closed after hours." Employer's Written Argument at 49; *see also*

with the vehicle, he reported it to his supervisor. Transcript at 54. This further shows that claimant was not indifferent to his employer's expectations, and that he made an attempt to comply with the employer's expectations regarding the use of LEDS. The employer has not met their burden to show that any violation of their expectations was willful or wantonly negligent.

December 17, 2022, Investigation. In the internal affairs report, claimant's supervisor took issue with a number of claimant's acts or omissions regarding the December 17, 2022, investigation. *See generally* Exhibit 1 at 28–41. However, based on a summary of the allegations against claimant which the employer deemed substantiated, their objections to claimant's conduct during the December 17, 2022 can be distilled to three interrelated but distinct concerns: that claimant failed to notify his supervisor after he learned that the mother had died; that claimant passed the investigation of the mother's death off to the sheriff's department rather than handling it himself; and that claimant gave the sheriff's deputies false or misleading statements regarding the investigation he had done prior to their arrival. *See* Exhibit 1 at 75–81. As such, to the extent the employer discharged claimant due to his conduct during the December 17, 2022, investigation, they did so primarily due to these three concerns. However, the employer has not shown by a preponderance of the evidence that claimant's conduct in those areas constituted willful or wantonly negligent violations of their standards of behavior.

Regarding claimant's failure to notify his supervisor, this concern was primarily based on claimant's alleged violation of the employer's policy stating, "If the initially assigned officer suspects that the death involves a homicide or other suspicious circumstances, a supervisor shall be notified to determine the possible need for the Major Case Team to respond to the scene for further immediate investigation." In his internal affairs report, claimant's supervisor wrote that claimant "failed to investigate the possibility of [the mother's] death being related to the alleged assault." Exhibit 1 at 29. The supervisor further explained at hearing that while "the criminal issue would likely not have been significant… there was potential for there to be a… criminally negligent homicide issue because the daughter put the mother in the back seat." Transcript at 20.

By contrast, claimant testified that the situation was "not a homicide issue," although he did not testify at length on this point. Transcript at 51. However, as part of the internal affairs report, the supervisor conducted a review of claimant's body-camera footage on December 17, 2022. In relevant part, the supervisor noted in his report that claimant stated to one of the sheriff's deputies, "The daughter didn't get [the mother] out on her own because she had been so aggressive, so they left her laying in the back seat an hour and a half before I got the call. So, I came out and made sure it was not a crime[.]" Exhibit 1 at 34. This, coupled with claimant's testimony, indicates that claimant did not believe that the mother's death was the result of a homicide or suspicious circumstances, and the balance of the evidence does not contradict this. The record suggests that the supervisor felt that claimant *should* have suspected the death to involve a homicide or other suspicious circumstances, but the applicable policy requires notification of a supervisor if *the initially assigned officer* suspects homicide or suspicious circumstances. In other words, the policy's requirement is invoked on the basis of the responding officer's subjective belief. Because claimant did not form such a belief, he was not required, under the terms of the policy, to notify his supervisor in this instance. Therefore, claimant did not violate the employer's policy by failing to notify his supervisor.

Transcript at 54. Claimant did not testify that the vehicle was parked—only that it was in a *parking lot*. As it is entirely possible to operate a vehicle in a parking lot, the employer's argument is unpersuasive.

Despite this, claimant arguably violated his supervisor's expectations that claimant contact him after learning of the death. However, the policy itself did not include guidelines as to when an investigating officer should suspect homicide or suspicious circumstances, and the supervisor did not appear to have given claimant explicit instructions during their earlier call that he expected claimant to call back or otherwise check in with him. Therefore, even if claimant violated the employer's expectations in failing to notify his supervisor, the record fails to show he knew or should have known that failing to do so probably violated the employer's expectations. The record therefore fails to show that any violation of the employer's expectations was willful or wantonly negligent.

Regarding claimant's failure to investigate the mother's death and instead allowing the county sheriff's office to handle it, the parties' accounts of certain details on this point again vary. The points of contention largely center on the question of whether claimant merely allowed the sheriff's department to handle the investigation, or whether, as claimant's supervisor suggested, claimant simply "told [one of the deputies] the case was his to handle once [the deputy] arrived." Exhibit 1 at 30. It is not necessary to resolve this point of contention, however, because the record lacks evidence to show that claimant knew or should have known that he was expected to handle it himself. Claimant explained in testimony that the sheriff's department handled the death investigation because "they were on scene and this was in their jurisdiction and the call was already in their area." Transcript at 47. Claimant's explanation here is credible, as one would logically expect that a death occurring in the sheriff department's jurisdiction, and following a call that originated in their jurisdiction by residents of their jurisdiction, would be investigated by the sheriff department, rather than an officer from another jurisdiction who essentially responded to their request for help with the matter because their own officers were unavailable at the time.

Moreover, while the employer produced a long list of the trainings that claimant had completed during his tenure,[7] and an even longer collection of policies that their officers were meant to abide by, none of these documents contained information showing that the employer had set procedures to follow in interjurisdictional circumstances like this, or that claimant knew or should have known the employer expected him to retain ownership of the investigation. Likewise, while claimant's supervisor counseled claimant twice in 2022, before the December 17, 2022, investigation, regarding matters that included concerns over claimant's investigatory thoroughness, the record does not show what the supervisor told claimant about these concerns.

The first such instance, in July 2022, was a verbal counseling, and does not appear to have been memorialized in writing. The counseling was mentioned in a later employee evaluation, but contained no details about what directions for improvement of his investigations, if any, the supervisor gave claimant at that time. *See* Exhibit 1 at 256. The second counseling, on December 2, 2022, was a written warning. The supervisor explained in the counseling statement that he again had learned that claimant's investigations were less thorough than the employer expected. In the "Plan/Goals" section of the document, however, the supervisor did not include any directions regarding claimant's future handling of criminal investigations. Exhibit 1 at 217. Nothing in the seven-page counseling statement addressed requirements or expectations for determining ownership of an investigation of an interjurisdictional matter like the December 17, 2022, investigation. Thus, while claimant may have generally been on notice of the employer's expectation that he improve the thoroughness of his criminal investigations, the

[7] *See* Exhibit 1 at 143–151.

record does not show that the employer addressed this particular concern with claimant at any point before the December 17, 2022, investigation.

Because the record does not show that claimant was trained on how to resolve such issues, that the employer maintained a policy explaining their expectations in such circumstances, or that the 2022 verbal and written warnings laid these expectations out for claimant, the employer has not met their burden to show that claimant knew or should have known what they expected him to do when faced with that question on December 17, 2022. Thus, even if claimant's failure to investigate the death himself, rather than leaving it to the sheriff's department, violated the employer's expectations, that violation was not willful or wantonly negligent.

Finally, the employer expressed concerns that claimant made false or misleading statements to the sheriff's deputies once they arrived on-scene, suggesting that claimant violated the employer's policy forbidding "[the] failure to disclose or misrepresenting material facts, or making any false or misleading statement on any application, examination form, or other official document, report or form, or during the course of any work-related investigation." At hearing, claimant's supervisor testified that claimant told one of the deputies he had interviewed both the decedent's husband and the decedent's son, but the supervisor went on to explain that claimant had not spoken to the husband at all and had only informally spoken to the son rather than conducting a formal interview. Transcript at 15. In his report detailing findings from claimant's body-camera footage, the supervisor noted that one of the deputies "collected [claimant's] information in order to list him as a witness. [Claimant] then said he 'can write up something on this too. Just because I did get interviews about the incident that led to me getting here.'" Exhibit 1 at 35. This quote pulled from claimant's body-camera footage appears to be the basis for the supervisor's assertion that claimant made a misrepresentation of material fact, or a false or misleading statement, during the course of the investigation.

To be clear, the record shows that claimant did not conduct a formal interview with either the brother or the father. Claimant admitted as much at hearing, explaining, "I mean, a formal interview, no. The… brother was present while I was interviewing the sister and the brother wasn't even a witness there at the time." Transcript at 48. In response to a question regarding what he told the deputy, claimant stated, "Um, I don't recall what our exact words of what our statements was [*sic*] between one another. I do believe he'd asked if I had talked to everybody and I had explained that I had had contact with the brother, grandma, and the sister who called it in, but not the father because he was highly intoxicated." Transcript at 48–49. This is largely consistent with the supervisor's review of the body-camera footage, and the record as a whole.

The employer's concern in this regard appears to ultimately be a matter of semantics. The quote pulled from claimant's body-camera footage that he "did get interviews about the incident" (emphasis added) may perhaps have been misleading in that it suggested that he conducted multiple formal interviews, when in reality he only conducted one formal interview and spoke to the other parties informally, but not to the father at all. Claimant did not, however, seem to at any point explicitly state that he conducted formal interviews of the brother or father. Neither does it appear from the record that claimant made any effort to deceive the deputies as to how many formal interviews he conducted, or that the deputies' subsequent investigation of the death was harmed by claimant's statement. At worst, claimant's statement about conducting multiple "interviews" appears to have been a syntax error, late at night, made at the scene of a tragic death. Therefore, even if claimant's statement here did violate the

employer's expectations regarding false or misleading statements, record fails to show that the statement was the result of more than mere carelessness or, at worst, ordinary negligence. The employer failed to show that claimant's statement was a willful or wantonly negligent violation of their standards of behavior, and it therefore was not misconduct.

Child Support Wage Garnishment. This concern centered on claimant's alleged request to the HR director that she not comply with a garnishment document she had received. As explained above, the record does not show that that conduct was a proximate cause of claimant's discharge. Even if it was, however, the employer has not met their burden to show that claimant's conduct here was a willful or wantonly negligent violation of their standards of behavior.

Claimant's supervisor, writing in an August 15, 2023, internal affairs report that summarized all of the employer's concerns with claimant's conduct, stated regarding the matter, "The concern of the complainant is [claimant's] interactions with a director level supervisor and his insistence that she fail to comply with a lawful judgment or order." Exhibit 1 at 48. The report alleged that claimant's conduct in the matter violated their policies regarding treatment of coworkers and members of the public, as detailed in Finding of Fact #4, above. Exhibit 1 at 90.

At hearing, the employer's city manager testified briefly on the matter, stating, "I find that one particularly onerous [*sic*] myself personally in that it involved one of my senior employees, and trying to get them to break the law from the lawful judgment. And, you know, ignore a court order and, you know, particularly for a police officer trying to make that happen." Transcript at 32–33. Claimant's supervisor offered little testimony on the matter beyond what was detailed in his August 2023 report, although he suggested on cross-examination that claimant's interaction with the HR director was "intimidating" to her. Transcript at 56. The HR director did not appear at the hearing.

Despite the allegations that claimant had urged the HR director to "fail to comply with a lawful judgment or order," the actual document in question is not clearly described in the record. The chain of emails between claimant and the HR director on the matter show that the document was not signed by a judge. Exhibit 1 at 48. Further, the record contains uncontroverted evidence that the garnishment document was the result of a mistake in the calculation by the child support office, that claimant actually was not in arrears in his child-support obligations at all, and that he was able to rectify the matter with the child support office before the order was meant to take effect, thus relieving the HR director of any obligation to act on it. At no time in the email correspondence did the HR director indicate that she believed claimant was asking her to break the law. Given these facts, it is not clear what legal obligation, if any, the HR director had to comply with the document, despite the employer's characterization of it as a "lawful judgment." Thus, the employer has not met their burden to show that claimant urged the HR director to break the law, or that claimant otherwise violated any of the broadly-worded policies detailed in Finding of Fact #4, above.

Likewise, the employer has not met their burden to show that claimant violated those polices by his demeanor while discussing the matter with the HR director. Despite claimant's supervisor's suggestion during cross-examination that claimant was acting in an "intimidating" manner towards the HR director, the director's letter made no mention of feeling intimidated, nor did she say that in their email exchange. *See* Exhibit 1 at 45–48. In fact, the email exchange between claimant and the HR director reads as reasonably cordial and professional, and indicates that the two reached a tentative accord as to how to

proceed by the end of the exchange, premised on the understanding that claimant likely would be able to resolve the matter before the HR director ran the upcoming payroll. Exhibit 1 at 46–48. Given this, the record does not show that claimant violated any of the aforementioned policies regarding interactions with other employees. Therefore, the employer has not shown, by a preponderance of the evidence, that claimant violated their reasonable expectations in this area of concern, and claimant's conduct therefore did not amount to misconduct.

In sum, regarding the three overall concerns discussed above, the record fails to show that claimant violated the employer's expectations, or that if he did, the violations were willful or wantonly negligent. The record therefore fails to establish that claimant was discharged for misconduct, and he is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-267542 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: December 6, 2024

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals **within 30 days of the date of service stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.
Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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Website: *www.Oregon.gov/employ/pages/employment-appeals-board.aspx*