

Draft Concept
(not including any matrix for subject conduct)

State of Oregon Disciplinary Guide

revised for 6-22-22

PURPOSE AND SCOPE: (for example:)

Pursuant to statutory authority, the uniform standards stated in this guide, in its entirety and as authored by the Commission on Statewide Law Enforcement Standards of Conduct and Discipline (LESC), are binding upon all Oregon law enforcement agencies, including corresponding review boards. Law enforcement agencies, including corresponding review boards are required to make determinations regarding alleged misconduct and impose disciplinary actions in accordance with the rules and regulations set by LESC and this guide. (ORS 243.809)

This guide is effective on *(date/2022)* and will be further developed in time to cover a broader scope. This guide establishes prescribed rules/guidelines for misconduct as identified by the guide including but not limited to specific misconduct enumerated by ORS 243.812. For misconduct not addressed by the current guide, the LESC may add additional rules at a future time. During this transitional period and for all misconduct not covered by this guide either for violation of rule, law, or agency policy, law enforcement agencies, or corresponding review board, may impose levels of disciplinary action consistent with their agency practices, so long as those disciplinary actions are no less than and consistent with minimum rules and standards of this guide and applicable law, including but not limited to ORS 243.808 and the revised standards of just cause.

OPTIONAL: As a matter of public interest, this guide it to provide for the following: sample list of public policy concerns:

- Accountability
- Clarity
- Consistency
- Correct Behavior
- Improve Trust with Community
- Improve Trust for Employees and Employer

PRINCIPLES (for example:)

Disciplinary action is generally considered a formal written personnel action against an employee in the form of written reprimand, suspension without pay, demotion or termination of employment on the basis of sustained misconduct. Disciplinary actions may be subject to grievance procedures dependent on agency rule or collective bargaining agreements. This guide follows statutory authority to set rules and appropriate disciplinary actions for imposition on law enforcement officers for sustained misconduct. This Guide has adopted both mandatory disciplinary actions and presumptive disciplinary actions for misconduct. Presumptive disciplinary actions can be altered on the basis of application of mitigating and aggravating circumstances. For example, a disciplinary action may be lessened based on mitigating factors outweighing aggravating factors.

For all disciplinary actions imposed upon a law enforcement officer, the law enforcement agency, or corresponding review board, has the burden of proof by a preponderance of evidence to show that the officer engaged in the alleged misconduct and that any disciplinary action taken against the officer was with just cause as defined by ORS 243.350. (ORS 243.808) For clarification, this new just cause standard supersedes any prior "just cause" standards in any collective bargaining agreement entered into or after July 1, 2021. Misconduct includes, but is not limited to violation of agency rule, violation of law or regulation, or violation of rule adopted by LESC. (*editing note: Misconduct needs a base definition*) All Oregon law enforcement agencies, including corresponding review boards, will make determinations regarding alleged misconduct and impose disciplinary actions in accordance with the rules and regulations set by LESC and this guide. (ORS 243.809)

Should a disciplinary action imposed on a law enforcement officer be grieved to arbitration, the arbitrator is bound the terms of this disciplinary guide. (ORS 243.706/ORS 243.808 et seq) If an arbitrator determines the law enforcement agency, or corresponding review board, has met their burden of proof of sustained misconduct and the elements of just cause under ORS 243.350, the arbitrator may not order any disciplinary action that differs from the disciplinary action imposed by the law enforcement agency, or corresponding review board, if the disciplinary action is consistent with the uniform standards established by LESC. (ORS 243.706) An arbitrator shall uphold the disciplinary action unless the arbitrator finds the disciplinary action is arbitrary and capricious, so long as such decision is not inconsistent with this guide and applicable law. (ORS 243.706 and ORS 243.808) Furthermore, in the case of termination of employment for sustained misconduct, an arbiter may not set aside or reduce the imposed disciplinary action if the set aside or reduction is inconsistent with public interest in maintaining community trust, is inconsistent with enforcing a higher standard of conduct for law enforcement officers, and is inconsistent with ensuring an accountable, fair and just disciplinary process. (ORS 243.808)

If the Arbitrator determines that law enforcement agency, or corresponding review board, has not proven the sustained misconduct by a preponderance of evidence and under the elements of just cause identified by ORS 236.350, the Arbitrator has the authority to rescind the discipline.

(PLACEHOLDER: I suggest a discussion on cases with multiple conduct violations leading to a single disciplinary action like termination because one act merits termination, but the investigation also includes other sustained policy violations for other acts within the same case that would merit lesser disciplinary action independently. Arbitrator may make a finding of preponderance of evidence for the one action of conduct which may no longer justify termination, however the other conduct proven merits a lesser disciplinary action, like possible suspension. This guide should provide instruction to the arbitrator on what to do in those cases.)

MENTAL STATE:

Employees are responsible for their actions and conduct. Consistent with the principles and categories of conduct of this guide, an employee's mental state may be relevant to their conduct and potential disciplinary action. This guide defines the following mental states:

- Negligent: an officer fails to use reasonable care, which is the degree of care and judgment used by reasonably careful police officers in the management of their own affairs to avoid harming themselves, others, or property. See Uniform Civil Jury Instruction 20.02.
- Reckless: an officer is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable police officer would observe in the situation. See ORS 161.085(9).
- Intentional: an officer acts with a conscious objective to cause the result or to engage in the conduct so described. See ORS 161.085(7).
- Application of any mental state is done using the standard of a reasonable person within their job classification at the time the act or omission occurs.

STEPS TO DETERMINE APPROPRIATE DISCIPLINARY ACTION: (for example:)

Step 1: Review the conduct to determine the subject category. Conduct may result in multiple categories being applicable.

Step 2: Identify the "level" of disciplinary action associated with the subject category at Step 1. For multiple sustained violations, the mandatory or presumptive disciplinary action level initiates with the higher mandatory or presumptive disciplinary action level.

Step 3: For mandatory disciplinary action, the agency, or corresponding review board, will impose the disciplinary action stated in this guide for the subject category.

For presumptive disciplinary action levels, the agency, or corresponding review board, will apply mitigating and aggravating factors as relevant to the conduct to determine if a greater or lesser disciplinary other than the presumptive level applies. *(thought: Aggravation and Mitigation only allow level of disciplinary action imposed to be change to a value specified in the guide. In other words, a presumptive termination only mitigates to a suspension, not a counseling).* Aggravation and Mitigation factors are only applied after Step 1 and Step 2 have been concluded.

For discussion: Education Based Alternatives/Remedial measures: Maybe the guide can acknowledge remedial measures and allow individual agencies to use those with limitations.

C. AGGRAVATING AND MITIGATING FACTORS (for example:)

Aggravating factors are circumstances that increase the severity of the impact of the directive violation.

Mitigating factors are circumstances that do not excuse or justify the conduct but decrease the severity of the impact of the directive violation.

Aggravating or mitigating factors are applied only **after** the sustained finding(s) for the totality of the conduct found and after any due process meeting. These factors are only used to alter a disciplinary sanction level. Aggravating and mitigating factors do not alter the category of conduct. For the purposes of this guide, sustained findings are evaluated after procedural due process. *(for example, after a "Loudermill" pre-disciplinary hearing if applicable)*

(ADD "GUIDE/MATRIX NEXT?")

Sample:

Aggravating and Mitigating Factors.

<i>Note: The mitigating and aggravating factors are used only to alter a corrective action level within a specified category, and these factors do not alter the category of conduct. An aggravating or mitigating factor will not be considered if already considered in determining the category.</i>	CALCULATION
Aggravating Factors - Add point/s	Points
Intentional conduct	2
Significant impact on community member or City operations/mission	2
Significant property damage or serious physical injury	2
Does not accept responsibility if policy violation is undisputed	1
Delay in reporting	1
Attempt to cover up conduct or behavior	2
Motivated by personal interest	1
Failure to meet documented expectations	1
Supervisory Position	1
Other (specified on a case-by-case basis) (Only to be used by final decision maker)	1
Total:	14
Mitigating Factors - Subtract point/s	Points
Unintentional conduct	1
No impact on community member or City operations/mission	1
No property damage or physical injury	1
Self-reported the violation	1
Attempt to ameliorate or correct the error (but not done to hide the error)	2
Positive attitude; accepts responsibility	2
Motivated by public interest or wellbeing of others	2
Positive work history	1
No repeated or other sustained violations	2
Other (specified on a case-by-case basis) (Only to be used by final decision maker)	1
Total:	
CALCULATION	14
Each factor that applies receives a corresponding point value. Factors that do not apply receive no point value. Subtract mitigation total (green) from aggravation total (red). If the number is negative, corrective action is mitigated. If the number is positive, the violation is aggravated. If the number is 0, the violation is neither mitigated nor aggravated. Aggravating and mitigating factors apply to the totality of the conduct sustained. Note: An aggravating or mitigating factor will not be considered if already considered in determining the category.	0