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[Draft narrative guide Schuback 8-15-22.docx](#)

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Michael,

Good afternoon. Chief Teague and I have been sharing some discussion points for a narrative guide. I also worked on a version beforehand. I would like to provide both versions for discussion for Commission review. Can you please add these materials for our next session?

Thanks,
Steven

Steven Schuback

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Oregon Commission on Statewide Law Enforcement Standards of Conduct and Discipline

An Introduction to the Rules and Statutes Statewide Discipline Guide

Rough draft concept Teague and Schuback 8-16-22

This is for discussion purposes only.

Pursuant to HB2930 (2021) and the ensuing statutes (ORS 243.808-812), the Commission on Statewide Law Enforcement Standards of Conduct and Discipline (LESC) developed discipline and just cause standards that are binding upon Oregon law enforcement agencies and peace officers (as defined in ORS 131.930), upon arbitrators working under ORS 243.706, and upon civilian or community oversight boards, agencies, or review bodies (as defined by ORS 243.812, where applicable; hereafter referred to as “oversight boards”). The rules are effective on DATE.

The disciplining bodies, which means agencies and oversight boards (OAR 265-005-0001), are required to adopt policies incorporating the rules (OAR 265-005-0025), even if that incorporation is by reference.

The purpose of this document is to provide familiarity with the standards as they appear in rule and statute.

Effects on Disciplinary Bodies

Misconduct means conduct that violates state, tribal or federal law or the policies of the law enforcement agency employing the law enforcement officer, or that subject the law enforcement officer to disciplinary action under the LESC rules (OAR 2165-005-0001). Upon their initial effective date, the LESC set forth rules on the new standards of just cause discipline for all disciplinary actions including rules that govern the appropriate level of disciplinary action imposed specific to the misconduct enumerated by the legislature in ORS 243.812. The LESC may modify or expand the rules to include other misconduct.

Note that the definition of misconduct includes violations of policies, but the rules prescribe no greater requirement for the enforcement of policies than existed before the rules were developed. However, for misconduct that is not identified in the current rules—that appears only in policy, for example—disciplinary action is nevertheless required to be consistent with the LESC rules (OAR 265-005-0015) including adhering to the new standard of just cause as identified by ORS 243.808.

Finding refers to the final determination by the decision maker (often the chief or sheriff) of a disciplining body that a law enforcement officer engaged in misconduct.

Disciplinary action for any misconduct includes only the following and does not include counseling or coaching:

- Written reprimand
- Suspension without pay
- Reduction in salary
- Demotion
- Termination

Every disciplinary action should be arrived at as described in ORS 243.808. That is, a disciplining body must show by a preponderance of the evidence, one, that an officer engaged in alleged misconduct and, two, that any disciplinary action taken against the officer was with just cause as defined by ORS 243.808 and ORS 243.350.

As required by ORS 243.808 and as defined by ORS 236.350 describes just cause as “a cause reasonably related to the public safety officer’s ability to perform required work. The term includes a willful violation of reasonable work rules, regulations or written policies.” Per OAR 265-005-0010, no collective bargaining agreement entered into or renewed on or after July 1, 2021, may include a standard of just cause other than the standard defined in ORS 236.350.

The disciplinary body may apply application of *aggravating and mitigating factors* and requires the disciplining body to document its reasoning for imposing a disciplinary action, including whether it found aggravating or mitigating factors and the relevant weight given to each factor that it did find (OAR 265-005-0030). The factors to be considered are identified in OAR 265-015-0035. Note that a disciplining body cannot apply an aggravating factor to the sanction if the factor was previously used to determine if misconduct occurred (OAR 265-005-0030). For example, in OAR 265-010-0010, "intent" is an element of the rule, so intent cannot be applied as an aggravating factor.

Disciplinary actions may be subject to grievance procedures dependent on agency rule or collective bargaining agreements. To avoid an arbitrator’s ruling that a finding disciplinary action was “arbitrary and capricious” (see ORS 243.808(1)(b)), the disciplining body must have follow the factors of ORS 243.808 and related statutes inclusive of the LESC rules for any disciplinary action imposed for misconduct.

Effects on Arbitration

Should a disciplinary action be grieved to arbitration, the arbitrator is bound by the terms of this disciplinary guide (ORS 243.706/ORS 243.808 et seq).

If an arbitrator determines a disciplining body has met its burden of proof of misconduct and just cause and if the disciplinary action is consistent the standards established by LESC rules, the arbitrator may not order any disciplinary action that differs from that imposed by the disciplining body (ORS 243.706) unless the arbitrator finds that the disciplinary action was “arbitrary and capricious” per ORS 243.808. When “the imposed disciplinary action is termination of employment, an arbitrator may not set aside or reduce the imposed disciplinary action if setting aside or reducing the disciplinary action is inconsistent with the public interest

Rough draft concept for discussion. Chief Teague and Steven Schuback 8-15-22

in maintaining community trust, enforcing a higher standard of conduct for law enforcement officers and ensuring an accountable, fair and just disciplinary process” (ORS 243.808(1)(c)).

If an arbitrator determines that a disciplining body has not met its burden of proof, the arbitrator can overturn the disciplinary actions. If the arbitrator finds that a disciplinary body met its burden of proof but finds that the disciplinary action was arbitrary and capricious, the arbitrator must rescind the disciplinary action and refer it back to the disciplining body which may, at its discretion, amend the disciplinary action. Similarly, an arbitrator may also review multiple instances of misconduct and uphold one disciplinary action but not others. (OAR 265-005-0020). In such cases, the disciplinary action/s found to be arbitrary and capricious refer back to the disciplining body.

Application of the Discipline Guide

Consistent with ORS 243.812, the LESC has identified specific misconduct that has an accompanying Discipline Guide which provides parameters for disciplinary action. For each finding of misconduct, the guides provide either a *mandatory* or a *presumptive* disciplinary action. Mandatory disciplinary actions are prescribed and cannot be altered; presumptive disciplinary actions can be modified after the application of aggravating and mitigating factors (ORS 243.706(9)).

Step 1: After procedural due process—for example, after a *Loudermill* pre-disciplinary hearing—refer to the disciplinary guide to identify if the sustained misconduct is identified by the guide. If so, proceed to Step 2. If the guide is not applicable, because the misconduct is not specifically identified by the guide and LESC rule, the disciplinary body may proceed in their normal course to impose disciplinary action. Be mindful of the obligation to explain the reasoning for the disciplinary action including aggravating or mitigating factors if applied.

Step 2: Identify the mandatory or presumptive disciplinary action for the sustained misconduct on the guide. For multiple violations, the disciplinary action initiates with the more severe disciplinary action.

Step 3a: For mandatory disciplinary action, the Disciplining Body must impose the prescribed disciplinary action

Step 3b: For presumptive disciplinary action, the Disciplining Body may apply the aggravating and mitigating factors (described in OAR 265-015-0035) to determine if a greater or lesser disciplinary action is justified. Aggravation and Mitigation factors are only applied after Step 1 and Step 2 have been concluded

Step 4: Impose the disciplinary action. The Disciplining Body must describe how it determined the disciplining action. The disciplinary body may apply ~~application of~~ *aggravating and mitigating factors* and requires the disciplining body to document its reasoning for imposing a disciplinary action, including whether it found aggravating or mitigating factors and the relevant weight given to each factor that it did find (OAR 265-005-0030). Note that a disciplining body cannot apply an aggravating factor to the sanction

if the factor was previously used to determine if misconduct occurred (OAR 265-005-0030). For example, in OAR 265-010-0010, "intent" is an element of the rule, so intent cannot be applied as an aggravating factor.

Aggravating and Mitigating Factors *OAR 265-010-0035*

Aggravating Factors:

(list from OAR)

Mitigating Factors:

(list from OAR)

Disciplinary Action Guide:

(goal is to make a chart)

Disciplinary Actions:

Written Reprimand

Suspension without pay
Salary Reduction
Demotion

Termination

CATEGORIES OF CONDUCT:

SEXUAL ASSAULT (OAR 265-010-0001):

Mitigated

Mitigated

Presumptive

SEXUAL HARASSMENT (OAR 265-010-005):

Mitigated

Presumptive

Aggravated

ASSAULT (OAR 265-010-0010):

Mitigated

Mitigated

Presumptive

**UNJUSTIFIED OR EXCESSIVE USE OF DEADLY FORCE
THAT RESULTS IN DEATH OR SERIOUS PHYSICAL INJURY
(OAR 265-010-0015):**

N/A

N/A

TERMINATION

UNJUSTIFIED OR EXCESSIVE USE OF PHYSICAL FORCE THAT RESULTS IN DEATH OR SERIOUS PHYSICAL INJURY (OAR 265-010-0015):

Mitigated

Mitigated

Presumptive

CONDUCT THAT IS MOTIVATED BY OR BASED ON A REAL OR PERCEIVED FACTORS OF AN INDIVIDUAL'S RACE, ETHNICITY, NATIONAL ORIGIN, SEX GENDER IDENTITY, SEXUAL ORIENTATION, RELIGION, OR HOMELESSNESS. (OAR 265-101-0020):

N/A

Mitigated

Presumptive

draft concept

ENGAGING IN MISCONDUCT DEMONSTRATING LACK OF GOOD MORAL CHARACTER AS
DEFINED BY OAR 265-010-0025:

N/A

N/A

TERMINATION

USE OF DRUGS OR ALCOHOL WHILE ON DUTY (OAR 265-010-0030)

Mitigated

Mitigated

Termination

draft concept

State of Oregon
Narrative
Disciplinary Guide and Matrix

Rough draft concept for 8-16-22
For discussion purposed only

PURPOSE AND SCOPE:

Pursuant to statutory authority, the Commission on Statewide Law Enforcement Standards of Conduct and Discipline (LESC) has adopted rules on just cause and disciplinary standards that are binding upon all Oregon law enforcement agencies, including corresponding review boards. The purpose of this document is to provide narrative and visual assistance in applying the LESC rules and corresponding statutes as related to HB2930 (2021).

Law enforcement agencies, including OSP, sheriffs, municipal police officers and 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. (ORS 243.812 and ORS 243.809) For the purposes of this narrative, a law enforcement agency, or if applicable, a civilian or community oversight board, agency or review body is considered a "disciplinary body." (OAR 265-005-0001) All disciplining bodies are required to adopt policies incorporating the established OARS. (OAR 265-005-0025)

The LESC rules and corresponding OARS are effective on *(date/2022)* and will be further developed in time to cover a broader scope. The LESC established prescribed rules for imposing disciplinary action for misconduct including but not limited to specific misconduct enumerated by ORS 243.812. For misconduct not addressed by the rules, a disciplining body may take disciplinary action pursuant to the agency's policies and practices so long as the disciplinary action is consistent with the related statutes and OARs (OAR 265-005-0015) Consistent disciplinary action includes using the evidentiary standards identified in ORS 243.808 and the just cause definition in ORS 236.350.

Disciplinary action includes any personnel action against a law enforcement officer in the form of a written reprimand, suspension without pay, reduction in salary, demotion or termination of employment upon a finding that the law enforcement officer engaged in misconduct. (OAR 265-005-0001). Misconduct means conduct that violates state, tribal or federal law or the policies of the law enforcement agency employing the law enforcement officer, or that subject the law enforcement officer to disciplinary action under the LESC rules. (OAR 2165-005-0001) Disciplinary actions may be subject to grievance procedures dependent on agency rule or collective bargaining agreements.

For all disciplinary actions imposed upon a law enforcement officer, the disciplining body 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) No collective bargaining agreement entered into or renewed on or after July 1, 2021, may include a standard of just cause other than the standard as defined in ORS 236.350. (OAR 265-005-0100)

For conduct identified in the disciplinary action matrix below, the rules provide for either mandatory disciplinary actions or presumptive disciplinary actions. Mandatory disciplinary actions cannot be altered. Presumptive disciplinary actions can be altered on the basis of application of mitigating and aggravating circumstances. For example, a disciplinary action may be lessened by the disciplining body based on mitigating factors outweighing aggravating factors. For all disciplinary actions, Aggravating and Mitigating factors are identified by OAR 265-010-0035. Application of aggravating and mitigating factors requires the disciplining body to document its reasoning, including whether it found aggravating or mitigating factors and the relevant weight given to each factor, for imposing a disciplinary action. (OAR 265-005-0030) When justifying the basis to depart from a presumptive sanction, the disciplining body is limited to the range of disciplinary actions permitted by the disciplinary action matrix. (OAR 265-005-0030) A disciplining body shall not apply an aggravating or mitigating factor if the factor is already included in determining whether misconduct occurred. (OAR 265-005-0030(4)). For example, for assaultive conduct under OAR 265-010-0010, "intent" is an element of the rule, so intent would not be applied later as an aggravating factor.

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 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 the rules 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 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. In cases where the disciplining body has meet the burden of proof that the factual conduct occurred, but an arbitrator finds the reasonableness of the level of disciplinary action imposed was arbitrary and capricious, the arbitrator may rescind the disciplinary action imposed. Under this circumstance, the disciplining body may, at its discretion, amend the disciplinary action. (OAR 265-005-0020) In other words, an arbitrator may find, by a preponderance of evidence, that an allegation of misconduct factually occurred, however, may also find that the reasonableness or level of disciplinary action imposed was not sustained consistent with ORS 243.808(1)(b) or (c), and subsequently the arbitrator may rescind the specific disciplinary action. The disciplinary body may then, thereafter, amend the disciplinary action. For example, an arbitrator may rule that based on ORS 243.808(1)(b), the reasonableness of a three day suspension was unreasonable and rescind the discipline. Thereafter, the disciplining body may amend the discipline at their discretion. The employee

would not be precluded from re-initiating the arbitration proceeding if the amended disciplinary action was further contested. (OAR 265-005-0020) An arbitrator may also review multiple instances of misconduct, and uphold a specific disciplinary action, and not uphold another disciplinary action based on the statutory factors. see OAR 265-005-0020

MENTAL STATE: Consistent with the principles and categories of conduct of rules, an employee's mental state may be relevant to their conduct and potential disciplinary action. This guide defers to 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 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

Step 1: Review the findings of conduct to determine the conduct category. Conduct may result in multiple categories being applicable. Procedurally, sustained findings by are evaluated after procedural due process. *(for example, after a "Loudermill" pre-disciplinary hearing if applicable)*

Step 2: Identify the "level" of disciplinary action associated with the subject category found in 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 disciplining body will impose the disciplinary action stated in this guide for the subject category.

For presumptive disciplinary action levels, the disciplining body agency may apply mitigating and aggravating factors as relevant to the conduct to determine if a greater or lesser disciplinary other than the presumptive level applies. Aggravation and Mitigation factors are only applied after Step 1 and Step 2 have been concluded. (discussion point: *ORS 243.812(1)(b) and OAR 265-005-0030 provide for "may include" or "has the discretion to impose agg/mit".*)

Aggravating and Mitigating Factors
OAR 265-010-0035

Aggravating Factors:

(list from OAR)

Mitigating Factors:

(list from OAR)

draft concept

Disciplinary Action Matrix:

(goal is to make a chart)

Disciplinary Actions:

Written Reprimand

Suspension without pay
Salary Reduction
Demotion

Termination

CATEGORIES OF CONDUCT:

SEXUAL ASSAULT (OAR 265-010-0001):

Mitigated

Mitigated

Presumptive

SEXUAL HARASSMENT (OAR 265-010-005):

Mitigated

Presumptive

Aggravated

ASSAULT (OAR 265-010-0010):

Mitigated

Mitigated

Presumptive

UNJUSTIFIED OR EXCESSIVE USE OF DEADLY FORCE THAT RESULTS IN DEATH OR SERIOUS PHYSICAL INJURY (OAR 265-010-0015):

N/A

N/A

TERMINATION

UNJUSTIFIED OR EXCESSIVE USE OF PHYSICAL FORCE THAT RESULTS IN DEATH OR SERIOUS PHYSICAL INJURY (OAR 265-010-0015):

Mitigated

Mitigated

Presumptive

CONDUCT THAT IS MOTIVATED BY OR BASED ON A REAL OR PERCEIVED FACTORS OF AN INDIVIDUAL'S RACE, ETHNICITY, NATIONAL ORIGIN, SEX GENDER IDENTITY, SEXUAL ORIENTATION, RELIGION, OR HOMELESSNESS. (OAR 265-101-0020):

N/A

Mitigated

Presumptive

ENGAGING IN MISCONDUCT DEMONSTRATING LACK OF GOOD MORAL CHARACTER AS DEFINED BY OAR 265-010-0025:

N/A

N/A

TERMINATION

USE OF DRUGS OR ALCOHOL WHILE ON DUTY (OAR 265-010-0030)

Mitigated

Mitigated

Termination

draft concept