

From: [Teague, John](#)
To: [Steven Schuback](#); [Slauson Michael](#); [Kemple Toni C](#); [Boss Frederick](#)
Subject: RE: DPSST commmission
Date: Monday, August 15, 2022 1:22:32 PM
Attachments: [Draft narrative for discussion TeagueSchuback 8-15-22a.docx](#)

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Well, shoot. It appears I'm 20 minutes late. I would've preferred this version, accepting Steven's suggested changes and making a few clarifications. If not too late, this filename is ...8-15-22a. If too late because it'll muddy things, we can meld it in later.

Steven, nevertheless, you may want to quickly look at and approve the very few suggested changes.

JOT

From: Steven Schuback <schuback@prhlaborlaw.com>
Sent: Monday, August 15, 2022 12:58
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Cc: Teague, John <TeagueJ@keizer.org>
Subject: DPSST commmission

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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

The LESC set forth rules that establish new standards of just-cause discipline, including rules that govern the level of disciplinary action for misconduct specifically enumerated by the legislature in ORS 243.812. Per statute, the LESC may later modify or expand the rules to specifically include other misconduct (cf. ORS 243.812(3)).

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). Observe 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 *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 finding that a disciplinary action was “arbitrary and capricious” (see ORS 243.808(1)(b)), the disciplining body must 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

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.

draft concept

Aggravating and Mitigating Factors
ORAR 265-010-0035

Aggravating Factors:

(list from ORAR)

Mitigating Factors:

(list from ORAR)

draft concept

Disciplinary Action Matrix:

(goal is to make a nice looking 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

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