

From: [Boss Frederick](#)
To: [Kemple Toni C](#)
Subject: FW: 112622 MAKLER EDITS to PROPOSED LESC Guide - For Monday's Meeting
Date: Monday, November 28, 2022 9:25:58 AM
Attachments: [112622 LESC Guide - SS 112222 - JOT 112322 - MJM 112522.docx](#)
[LESC Guide - SS 112222 - JOT 112322.docx](#)

From: Mark Makler <mark.code3law@gmail.com>
Sent: Saturday, November 26, 2022 3:00 PM
To: Boss Frederick <fred.boss@doj.state.or.us>
Subject: 112622 MAKLER EDITS to PROPOSED LESC Guide - For Monday's Meeting

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Fred:

Attached, using WORD track changes, are my proposed edits to the PROPOSED LESC Guide that was sent out to the Commission on 112322.

Can you please pass this email and the attachment along to the all of the people that need to receive this info before Monday.

STAY HEALTHY and Regards,

Mark J. Makler
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Of Counsel to Public Safety Labor Group
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Begin forwarded message:

From: Emmert Angie <angie.emmert@doj.state.or.us>
Subject: LESC Guide - For Monday's Meeting
Date: November 23, 2022 at 12:17:11 PST
To: Boss Frederick <fred.boss@doj.state.or.us>, Slauson Michael <michael.slauson@doj.state.or.us>, McCullough Kimberly <kimberly.mccullough@doj.state.or.us>, Kemple Toni C <toni.c.kemple@doj.state.or.us>, Gilman Kristen <kristen.a.gilman@doj.state.or.us>, "schuback@prhlaborlaw.com" <schuback@prhlaborlaw.com>, "Anderson, Tarron K" <tarron.anderson@oregonstate.edu>, John Shafer <john.shafer@umatillacounty.net>, "teaguej@keizer.org" <teaguej@keizer.org>, "angiebran@co.clackamas.or.us" <angiebran@co.clackamas.or.us>, Mark Makler <mark.code3law@gmail.com>, "bennyCwilliams@yahoo.com" <bennyCwilliams@yahoo.com>, Laura Fine <attorneylaurafine@gmail.com>, "anil@pslglawyers.com" <anil@pslglawyers.com>, HENSON Brian C * DPSST <Brian.HENSON@dpsst.oregon.gov>, "timothyaddleman@ctuir.org" <timothyaddleman@ctuir.org>, "michael@michaelwulaw.com" <michael@michaelwulaw.com>, Rep Noble <NobleR@oregonlegislature.gov>, Sen Prozanski <ProzanF@oregonlegislature.gov>
Cc: "Ybarra, Kim" <kybarra@clackamas.us>, Nasbe Joshua <Joshua.Nasbe@doj.state.or.us>, John Shafer <john.shafer@umatillacounty.gov>

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Oregon Commission on Statewide Law Enforcement Standards of Conduct and Discipline

Introduction to the Discipline Guide

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 law enforcement officers (as defined in ORS 131.930), including law enforcement officers who are covered by the Public Employee Collective Bargaining Act (PECBA, ORS 243.650 - 243.806), and upon their “disciplining bodies” (OAR 265-005-0001) which include Oregon law enforcement agencies (again, as defined in ORS 131.930), 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 LESL 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 LESL may later modify or expand the rules to specifically include other misconduct (cf. ORS 243.812(3)).

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

The rules became effective on November 1, 2022 for all agencies, including agencies with a collective bargaining agreement executed after July 1, 2021.

Effects on Disciplinary Bodies

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

Every disciplinary action should be arrived at as described in ORS 243.808. This means that a disciplining body must show by a preponderance of the evidence, 1) that an officer engaged in alleged misconduct and, 2) that any disciplinary action taken against the officer was with just cause as defined by ORS 243.808 and ORS 243.350.

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 LESL rules (OAR 265-005-0001). While the definition of misconduct includes violations of policies, the rules prescribe no greater requirement for the enforcement of policies than existed before the rules were developed; nevertheless, all disciplinary action for misconduct—even misconduct not identified in the LESL

rules, including policy violations—is *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 disciplinary decision maker with authority to make the final determination (often the chief or sheriff) of a disciplining body that a law enforcement officer engaged in misconduct.

A "*Disciplinary action*" for any misconduct (whether or not the misconduct is covered by a LESC rule) means the following and only the following and does not include counseling or coaching:

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

As required by ORS 243.808 and as defined by ORS 236.350; "*just cause*" is "a cause reasonably related to the law enforcement 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 shall apply *aggravating and mitigating factors, if applicable*, and the disciplining body is required 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). Aggravating and mitigating factors to be considered by the disciplinary body are identified in OAR 265-015-0035. However, a disciplinary body cannot apply an aggravating factor to the disciplinary action 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 disciplinary body must follow the factors in ORS 243.808 and related statutes, as reflected in the LESC rules, for any disciplinary action imposed for misconduct, including explanation and reasoning for the disciplinary action imposed and the application of any aggravating and mitigating factors.

Effects on Arbitrators

When a disciplinary action is processed to arbitration, the arbitrator is bound by the terms set forth in ORS 236.350 et seq., ORS 243.706 and ORS 243.808-812).

If an arbitrator determines a disciplinary 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 disciplinary 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 disciplinary body has not met its burden of proof, the arbitrator can overturn the disciplinary action. 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 disciplinary body which may, at its discretion, amend the disciplinary action.

Similarly, an arbitrator may review multiple instances of misconduct and uphold one (1) or more disciplinary actions for misconduct but not for every instance of misconduct. (OAR 265-005-0020). In such cases, the arbitrator shall refer the disciplinary action/s found to be arbitrary and capricious back to the disciplining body, which may, at its discretion, amend the disciplinary action.

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 from the LESC rules and this guide. For multiple violations, the disciplinary action initiates with the more severe disciplinary action.

Step 3a: For *mandatory* disciplinary action, the Disciplinary Body must impose the prescribed disciplinary action.

Step 3b: For *presumptive* disciplinary action, the Disciplinary 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 and document the reasoning. The disciplinary body is required to document its reasoning for imposing a disciplinary action, including whether it found aggravating or mitigating factors and to document the relevant weight given to each factor (OAR 265-005-0030). (Note that a disciplinary body cannot apply an aggravating factor to a 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

Aggravating and Mitigating Factors

OAR 265-010-0035

Aggravating Factors:

(list from OAR)

Mitigating Factors:

(list from OAR)

DRAFT

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

DRAFT

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The LESL 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 LESL may later modify or expand the rules to specifically include other misconduct (cf. ORS 243.812(3)).

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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 LESL rules (OAR 265-005-0001). While the definition of misconduct includes violations of policies, the rules prescribe no greater requirement for the enforcement of policies than existed before the rules were developed; nevertheless, all disciplinary action for misconduct—even misconduct not identified in the LESL

rules, including policy violations—is *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.

A "*Disciplinary action*" for any misconduct (whether or not the misconduct is covered by an LESC rule) means the following and only the following and does not include counseling or coaching:

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

As required by ORS 243.808 and as defined by ORS 236.350, "*just cause*" is "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 in ORS 243.808 and related statutes, as reflected in the LESC rules, for any disciplinary action imposed for misconduct, including explanation and reasoning for the disciplinary action imposed and the application of any aggravating and mitigating factors.

Effects on Arbitrators

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)).

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Application of the Discipline Guide

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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 and document the reasoning. The disciplining body is required to document its reasoning for imposing a disciplinary action, including whether it found aggravating or mitigating factors and to document the relevant weight given to each factor (OAR 265-005-0030). (Note that a disciplining body cannot apply an aggravating factor to a 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

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OAR 265-010-0035

Aggravating Factors:

(list from OAR)

Mitigating Factors:

(list from OAR)

DRAFT

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(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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