

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-08-12

(MANAGEMENT SERVICE/REORGANIZATION/LAYOFF)

VALERIE RUX,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON,)	AND ORDER
OREGON YOUTH AUTHORITY,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued on October 22, 2012, by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on June 20, 2012, in Salem, Oregon. The record closed on July 31, 2012, following receipt of the parties' post-hearing briefs.

Marshall Dunst, Attorney at Law, Salem, Oregon, represented Appellant.

Gary M. Cordy, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On April 6, 2012, Appellant Valerie Rux filed this timely appeal of the decision of the State of Oregon (State), Oregon Health Authority (OHA) to eliminate her position and to lay her off from State service. Rux alleges that the layoff was a pretext for a removal for cause.

The issues is:

Did the State remove Rux from management service as a result of a legitimate reorganization, or lack of work, within the meaning of ORS 240.570(2)? If so, did the removal violate ORS 240.570(3)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The OHA is an agency of the State. OHA has a cooperative agreement with the Department of Human Services (DHS), delegating the performance of much of its human resource needs to DHS. OHA follows DHS policies regarding layoff procedures for management service employees.

2. In 2009, the legislature created the Office of Healthy Kids (Healthy Kids) within OHA. Its purpose is to facilitate the enrollment of eligible children in Oregon medical health care coverage programs.

3. Rux was hired in the spring of 2009 as an Operations Policy Analyst 3, filling a management service position transferred from DHS to Healthy Kids to help set up the agency. Rux was effectively the second employee of the new agency. Once the agency was in operation, Rux's position became the contract coordinator for Targeted Outreach Grant Organizations (TOGO). The duties of the TOGO position were primarily to oversee the health coverage outreach and enrollment process provided by grantees—governmental, non-profit, and community organizations. Rux's duties included monitoring the grantees' performance regarding the terms of the grants and Medicaid eligibility. The TOGO position had no supervisory duties over other Healthy Kids employees.

4. Later in 2009, Healthy Kids created and filled another Operations Policy Analyst 3 position, the contract coordinator for Certified Application Assistance Organization (CAAO), a position not in the management service. The CAAO position's function and duties were similar to Rux's TOGO position, except that the CAAO oversaw entities which were contractees, not grantees.

5. Cathy Kaufmann has been the Administrator of Healthy Kids since its creation; she was responsible for setting up the agency and modifying its structure to meet its goals. Rux was the only employee of the program not hired by Kaufmann. Because the program is new, Kaufmann has engaged in a continual process of evaluation and modification of the staffing structure of the program. Kaufmann reports to OHA Director Bruce Goldberg.

6. During December 2010, Healthy Kids participated in a "lean study" regarding improving the efficiency of the agency, with a focus on the two contract coordinator Operations Policy Analyst 3 positions, the TOGO and CAAO positions. The results of the study suggested to Kaufmann that the duties of the TOGO and CAAO positions could be combined into one position. Kaufmann deferred action on that issue because she had higher priority tasks and because she had not determined what duties would remain to be assigned to the remaining position if the duties of the previous two positions were combined.

7. After the agency created two Operations Policy Analyst 4 positions and filled them, Rux argued that her position had more responsibility than those positions and asked that her position be reclassified to Operations Policy Analyst 4. In December 2010, Kaufmann signed a request to reclassify Rux's position. After processing by OHA and Human Resources staff, the OHA/DHS Classification and Compensation Unit recommended the reclassification to DAS on September 23, 2011. The recommendation noted that Healthy Kids "is still evolving and changing." The reclassification was never completed.

8. On September 29, 2011, the agency hired Bevin Hansell as Deputy Administrator. Hansell became Rux's immediate supervisor. One of the first tasks Kaufmann assigned Hansell was to begin the process of merging the contract coordinator TOGO and CAAO positions into one position.

9. After September 22,¹ the agency began a personnel investigation of Rux over some allegedly inappropriate remarks made after a meeting with an underperforming grantee. The agency held a fact finding meeting on September 30. Rux defended her actions in part by stating that meeting with underperforming grantees was very stressful for her.

10. The agency put the TOGO/CAAO reorganization on hold pending the outcome of the investigation, discipline, and appeal of Rux's conduct.

11. In late October or early November, Rux had her first meeting with Deputy Administrator Hansell. Rux believed that Hansell was hostile to her.

12. On November 14, the agency issued Rux a predissmissal letter. On November 18, the day after the predissmissal meeting, Rux was notified that she would not be dismissed, but would receive some unspecified discipline. On December 8, 2011, the agency demoted Rux to Operations Policy Analyst 2. As part of that demotion, some of Rux's duties were transferred to other employees. Hansell took over the portion of Rux's job that required her to meet with and contact underperforming grantees. Hansell made this reassignment because Rux had been disciplined for remarks made at a meeting with an underperforming grantee, and Rux had also stated that these meetings were stressful.

Also during November, Rux filed a harassment complaint against Hansell with Human Resources; two weeks later, Human Resources notified Rux that it considered the matter resolved. During this time frame, Rux was notified that she was to report to Jon Gail, who had been hired in early November.

13. Rux appealed her demotion to ERB, and the matter was mediated and resolved without a hearing. The agency restored Rux to Operations Policy Analyst 3, and the appeal was dismissed on March 2, 2012. However, the agency did not restore duties to Rux that Kaufmann believed to be more appropriate for an Operations Policy Analyst 4. The agency also did not restore duties to Rux that Hansell had assumed.²

14. In February 2012, the Oregon legislature cut the budget for Healthy Kids by close to one million dollars. The legislature did not specify the precise cuts the agency should make. In

¹Unless otherwise stated, all subsequent events occurred in 2011.

²It is apparent that Kaufmann and Hansell were reluctant to place Rux back under the same circumstances in which she made the allegedly inappropriate remarks.

April 2012, the governor signed House Bill 4131, directing state agencies with more than 100 employees to attain a ratio of 11 non-supervisory employees to each one supervisory employee.³

15. OHA Director Goldberg directed Kaufmann to develop a plan to implement the budget reduction. He told Kaufmann to maintain client services and, if layoffs were required, to layoff management employees and to layoff non-management union-represented positions only as a last resort. Goldberg believed that this approach to budget cuts was consistent with the intent of the legislature. Goldberg did not direct Kaufmann to cut any specific positions.

16. Kaufmann determined she could not implement the budget cuts without eliminating two positions.

17. Kaufmann decided to make layoffs based on the goal of causing the least impact to the work of Healthy Kids, and applied DHS policy 060-027(2)(a)(A) to help identify positions for layoff.

18. DHS policy 060-027(2) “**Identifying Positions**” provides in part:

“a. Positions will be identified based on function, program or geographic area, to be determined by the Appointing Authority.

“A. The Appointing Authority shall consider the needs of the organization in terms of the types of positions and the special knowledge and skills necessary to accomplish the work of the Department to serve the people of the State of Oregon.

“b. The Department shall:

“A. Consider the needs of the organization in terms of the type of positions and the special knowledge, skills and abilities necessary to accomplish the work of the agency as best serves all people of the State of Oregon.

“B. Consider the qualifications of the employees in terms of special skills and expertise.

“C. Consider the quality of performance, relative merit, and length of state service in determining the order of the individual’s removal from management service due to reorganization, lack of work, or curtailment of funds (layoff).”

³House Bill 2020, which required DAS and other state agencies to give the legislature information about the ratio of non-supervisory State employees to supervisory employees and the ratio of non-managerial State employees to managerial employees, had already become law in July 2011.

19. Kaufmann determined that there were only four management service positions that could be considered for layoff. They were: (1) Kaufmann's administrative assistant; (2) Hansell; (3) Rux's TOGO position; and (4) Vikki Mata, a non-supervisory management service Public Affairs Specialist whose duties were focused on marketing the agency's services.

20. Kaufmann decided to eliminate Mata's marketing position because she understood that the legislature wanted the agency to cease marketing activity. As part of the previously proposed TOGO/CAAO reorganization, Kaufmann and Hansell had earlier discussed which TOGO and CAAO duties could be combined or eliminated. Kaufmann determined that (1) some additional duties performed by the TOGO position (the outreach coordinator duties) could be absorbed by Hansell; (2) other outreach duties the TOGO position had performed could be taken over by represented, non-management service staff; and (3) other duties of the TOGO position could be eliminated.

21. Kaufmann believed that her Administrative Assistant and Hansell were performing duties more essential to Healthy Kids that could not be transferred to other staff. Accordingly, Kaufmann decided that Rux's TOGO position would be the second position eliminated.

22. On March 14, 2012, OHA informed Rux by letter that her position was to be eliminated effective April 13, 2012.⁴ Because Rux did not have prior classified service to which she could be restored, OHA informed Rux that she would be laid off when her position was eliminated.

23. Two weeks after her layoff, Rux obtained another State position with the Oregon Health Authority.

24. At the time of hearing, Rux's position had not been restored, and her former duties were distributed as Kaufmann had planned.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The State did not violate ORS 243.570(2) or (3) when it removed Rux from the management service. The State's removal of Rux did not violate ORS 240.570(2). The Department's removal of Rux was part of a legitimate layoff and reorganization and did not violate ORS 240.570(3).

Standards for Decision

ORS 240.570(2) provides:

⁴Human Resources Interim Director for OHA, Cheryl Miller, testified that, under State of Oregon practice, only the legislature can formally "eliminate" a position. An agency may layoff staff, eliminate the duties of a position, and hold the position vacant. While imprecise, we will use the term "eliminate a position" for brevity.

“An appointing authority may assign, reassign and transfer management service employees for the good of the service and may remove employees from the management service due to reorganization or lack of work.”

Rux has the burden of proof in this appeal of a nondisciplinary removal from management service due to reorganization. OAR 115-45-0030(6); *Fery v. State of Oregon, Department of Administrative Services, Information Resource Management Division, General Government Data Center*, Case No. MA-31-02 at 37 (October 2005), *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998). This Board reviews layoffs pursuant to a reorganization decision under a deferential standard:

“In generally discussing the standards to be applied in reviewing management service appeals under ORS 240.570(2) (which includes management service removals due to reorganization), we noted that we are ‘not authorized to do equity or second-guess the efficacy of employer decisions.’” *Rosevear* at 11, n 18, citing *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (May 1993), *recons*, (June 1993), *rev’d and rem’d*, 129 Or App 565, 879 P2d 1335 (1994), *order on remand*, (November 1994). *See also Fery* at 37.

This Board has further stated:

“* * * We are not empowered under ORS 240.570 (4) to judge the efficacy of employer reorganizations, or to decide whether such decisions are necessary or fair. Management restructuring, like transfer decisions ‘for the good of the service,’ is an activity in which employers must be ‘free to exercise substantial discretion in determining how best to utilize their own management personnel in the pursuit of agency objectives.’ *Downs v. Children’s Services Division*, Case No. MA-12-90 (1992), *AWOP* 115 Or App 758 (1992).” *Rosevear* at 13.

In reviewing reorganizations, this Board has held that:

“To be legitimate, a reorganization must be rational and bona fide from inception to implementation. It must be made in good faith, and it must advance the efficiency and effectiveness of the organization. A legitimate reorganization is not contrived or a sham for some other purpose. In a given organization, numerous different forms of reorganization may be legitimate. *Rosevear* at 11.” *Fery* at 37 (emphasis deleted).

Rux argues that her layoff was a pretext for removing her for cause⁵ or was retaliation for her grievance, which had been resolved through mediation. However, there is no evidence that OHA departed from Goldberg’s criteria or OHA or DHS rules in determining that Rux’s position should be one of the two selected for elimination. Healthy Kids had suffered a significant budget reduction.

⁵ORS 240.570(3) provides that a management service employee who has completed trial service may be removed from the management service “if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.”

be one of the two selected for elimination. Healthy Kids had suffered a significant budget reduction. Kaufmann determined that the reduction could not be implemented without the elimination of two positions. The legislature's budget reduction and management ratio legislation, as interpreted by OHA Director Goldberg, provided Kaufmann with direction that union-represented non-management positions were to be eliminated only as a last resort.⁶ Rux's position was one of two contract coordinator positions in the Healthy Kids program, and Kaufmann had already determined that it would be more efficient to have one such position. The other contract coordinator position was a union-represented position that was not in the management service

Rux argues, however, that her recent discipline, and evidence that some of her supervisors were unhappy with her, demonstrate that the layoff decision was made for disciplinary or other non-economic reasons. We conclude that, while Rux arguably presented some evidence of potential bias on the part of OHA decision makers, the weight of evidence demonstrates that OHA's decision to eliminate Rux's position was consistent with OHA and DHS policies and driven by the legislative mandate to reduce management employee positions.⁷ Rux failed to demonstrate that her layoff was not made in good faith, did not advance the efficiency and effectiveness of the organization, was a sham, or was contrived to impose discipline on her. We will dismiss the appeal.

ORDER

The appeal is dismissed.

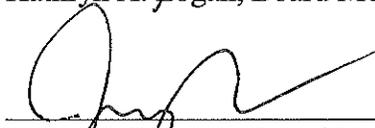
DATED this 12 day of December, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Board Member



Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

⁶There is no evidence that Goldberg's criteria for layoff were based on any animus towards Rux, or that he was even aware of her situation.

⁷Rux presented no evidence that it would have been more appropriate to eliminate any other employee's position.