

FINDINGS OF FACT

1. In December of 2008, Appellant started working as a classified unrepresented public affairs specialist (PAS) 2 for the State. In February 2013, she started working as a Principal Executive/Manager D (PEMD). In April 2014, Appellant became a PAS3 in OHA's Communications department. Her PEMD and PAS3 positions were management service positions.

2. Lynne Saxton started working as the director of OHA in January 2015. During her first 60 days in that role, Saxton discovered that the agency had a large number of "limited duration employees" who were working well beyond the date that their employment was supposed to end. In some instances, those employees were working ten years longer than expected. By February or March of 2015, Saxton learned that, due to a practice of occasionally assigning more than one employee to a single position (known as a "double-fill"), the agency was employing about 200 more people than the state legislature had authorized.

3. As a result of her discoveries, Saxton started looking for ways to swiftly return the agency to a legislatively-approved staffing level. To that end, she instructed each of OHA's divisions to conduct "functional assessments" to determine precisely what the law required the agency to do and find out whether any of that work was being duplicated by multiple departments or individuals. Those assessments revealed that several departments performed closely-related work, and that a number of positions could be abolished because their work responsibilities could be absorbed by other employees.

4. After completing the functional assessments, which occurred near the end of May 2015, OHA's division directors were instructed to select management service employees for layoff, as their positions could be abolished more quickly than either bargaining unit or non-bargaining unit, non-managerial positions. The directors were then told that, when selecting positions, they should focus on employee skill sets and eliminate duplicate efforts and double-fills. They were also told that, although they could consider a manager's past performance, that particular consideration was not intended to be a key factor. Ultimately, approximately 30 OHA managers were chosen for layoff. One of those chosen was Appellant.

5. During the same general time period, the OHA also determined that it would not extend limited duration positions and would no longer employ deputy directors. Additionally, in an effort to minimize overlapping work, several OHA departments would be combined and a number of new divisions would be created. One such division would be a new External Relations division, which would include the Communications department and other groups.

6. When Appellant's Communications department was being reviewed, it had more employees than authorized positions. In the end, one of the department's three PAS3s was selected for layoff because the division she worked for would no longer exist after the reorganization. Between the two other PAS3s, OHA concluded Appellant did not have sufficient external media work experience to be retained in the remaining PAS3 position.

7. On July 8, 2015, Director Saxton sent out a letter to all OHA staff summarizing the agency's reorganization plans. Earlier that same day, the OHA's Human Resources director,

Cheryl Miller, and the Communications department's interim director, Susan Wickstrom, met with Appellant and provided her with two layoff notification letters.

8. The first of the two letters notified Appellant that, "to support the goals of the Oregon Health Authority reorganization," her PAS3 position was being abolished effective August 12, 2015. It further noted that because Appellant was "an employee in management service with prior management service," she had the right to be restored to her former PEMD position in the OHA's Communications department. At that time, however, there were no PEMD positions available in that department, and no PEMD positions available in another part of the agency that OHA determined matched Appellant's skill set.

9. The second letter notified Appellant that, effective August 14, 2015, her PEMD position was also being abolished as part of the agency's reorganization. In addition, it provided that, because of the same "restoral rights," Appellant could respond to Miller within five working days and be restored to a PAS2 position in the OHA's Communications department, instead of being laid off.

10. On July 13, 2015, Appellant informed Miller that she would accept the PAS2 position, rather than be laid off. On August 7, 2015, she filed the instant appeal. On August 17, 2015, Appellant started working as a PAS2, which is a classified position in the bargaining unit.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The OHA's employment action did not violate ORS 240.560 or ORS 240.570.

Legal Standards

We review management service layoffs under ORS 240.570(4). This statute provides that employees who are removed from management service pursuant to ORS 240.570(2) may appeal to this Board "in the manner provided by ORS 240.560." Our review is limited as to whether the action taken, in this case a layoff, "was not taken in good faith for cause." *See* ORS 240.560(4).¹

Appellant asserted that OHA violated ORS 240.560 and ORS 240.570, although her focus was on ORS 240.570. She characterized OHA's action as a punitive, involuntary demotion from her PAS3 management service position. However, none of the evidence presented indicates that her "demotion"—which the record shows consisted of two layoffs and two ORS 240.570(5) restorations—was at all disciplinary. Therefore, we examine whether there was a violation of ORS 240.570(2), which addresses non-disciplinary personnel actions.

¹ORS 240.560(3) also provides for relief in other specific situations that are not germane to this appeal.

In relevant part, ORS 240.570(2) provides that management service employees may be removed from management service “due to reorganization.” In cases arising under that subsection, Appellant has the burden of proof. OAR 115-045-0030(6). Specifically, Appellant must prove that the removal at issue was done in bad faith. *See Fery v. State of Oregon, Department of Administrative Services, Information Resource Management Division, General Government Data Center*, Case No. MA-31-02 (October 2005) (appellant’s burden to show that removal was done in bad faith and not due to reorganization). We do not second-guess an employer’s decision to reorganize and layoff management service employees, unless we find evidence of another motivation for layoff or termination. *Id.* at 37, citing *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (May 1993), *recons.* (June 1993), *reversed and remanded on other grounds*, 129 Or App 565 (1994), *order on remand*, (November 1994).

Discussion

We determine an employer’s motivation by examining the evidence in the record. *Fery* at 34. Here, the evidence shows that OHA made significant changes to its overall organizational structure, resulting in a “transformed system” with “seven functional divisions that report to the OHA Director” replacing “18 operational units.” Moreover, approximately 30 managerial positions—including Appellant’s and a handful of others in her department—were abolished all at once. Regarding OHA’s proffered rationale, we find it entirely reasonable that, where possible, a state agency would seek to be financially sustainable, reduce double-fills, “[u]se limited duration appointments appropriately,” and minimize “duplicated efforts.” It also follows that doing so would tend to advance efficiency and effectiveness at OHA. On top of that, OHA has credibly presented a sufficiently rational basis, outlined above, for specifically targeting management service employees and for selecting Appellant’s positions in particular.

In her appeal, Appellant initially argues that her layoffs “were not performed according to policy or the Collective Bargaining Agreement.” This Board, however, cannot overturn or set aside a management service personnel action for violation of a personnel rule. *See Knutzen v. Department of Insurance and Finance*, 129 Or App 565, 572 (1994). Further, we have no jurisdiction under ORS 240.560 or ORS 240.570 for violations of a collective bargaining agreement.

Appellant further claims that her layoff, along with the layoff of others, was “conducted for political reasons.” She has not developed that theory in detail and has ultimately failed to produce any compelling evidence to substantiate it. Without proof, and without a more meaningful explanation, the charge is too speculative and must be dismissed.

Appellant also argues that she is currently being paid less than she should be, and that her current PAS2 position is inappropriately classified. Again, those particular issues are not covered by the language of ORS 240.560 or ORS 240.570. Accordingly, we are without jurisdiction to consider them here. Finally, we may not consider the merits of Appellant’s Age Discrimination in Employment Act argument, as that subject was not alleged in the original appeal.

ORDER

The appeal is dismissed.

DATED May 31, 2016.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.