

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-016-15

(MANAGEMENT SERVICE LAYOFF)

BARBARA RIES-FAHEY,)	
)	
Appellant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON HEALTH)	AND ORDER
AUTHORITY,)	
)	
Respondent.)	
_____)	

Appellant appeared *pro se*.

Yael Livny, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On January 22, 2016, Administrative Law Judge (ALJ) B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. See OAR 115-045-0040(2); 115-010-0090. Neither party filed objections.

When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

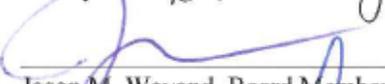
ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The appeal is dismissed.

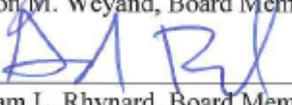
DATED this 16 day of February 2016.



Kathryn A. Logan, Board Chair



Jason M. Weyand, Board Member



Adam L. Rhynard, Board Member

This Order may be appealed pursuant to ORS 183.482.

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BARBARA RIES-FAHEY,)	
)	
Appellant,)	
)	RECOMMENDED RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON HEALTH)	AND PROPOSED ORDER
AUTHORITY,)	
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on September 23, 2015, in Salem, Oregon. The record closed on November 9, 2015, following receipt of the parties' post-hearing briefs.

Appellant Ries-Fahey appeared *pro se*.

Yael Livny, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On September 2, 2015, Appellant filed this Complaint alleging that the State of Oregon, Oregon Health Authority (OHA) had violated ORS 240.570(2) by demoting her and reducing her pay after minimal notice.¹

The issue is:

1. Was Appellant removed from management service, and reduced in salary, during a legitimate reorganization for the good of the service (in good faith for cause) consistent with ORS 240.570(2)?

¹While the Appeal did not cite any statute, the ALJ correctly concluded that the Appeal stated a claim under ORS 240.570(2). See Ruling section.

We conclude that OHA removed Appellant from management service, and reduced her salary, during a legitimate reorganization for the good of the service and in good faith, consistent with ORS 240.570(2).

RULINGS

After the Appeal was filed, Respondent moved to dismiss on the grounds that the Appeal failed to state a claim for relief under ORS 240.570. Respondent renewed its motion at the start of the hearing and, again, in its post-hearing brief. The appeal letter alleged that (1) Appellant had been called into the July 8, 2015 layoff meeting without notice; (2) Appellant had been informed that she had until noon that day to sign a form agreeing to termination or accepting restoration to classified service at a reduced rate of pay; (3) after requesting a copy of the agreement she signed, OHA failed to provide it; (4) OHA categorized her separation in multiple ways; (5) there was a past practice of ‘red circling’² the wages of managers moved back into classified positions; and (6) Appellant continued performing the same work after the position change except that she no longer attended OHA management meetings. For purposes of this Recommended Order, we assume the allegations in the appeal are true. We also rely on undisputed facts discovered during our investigation. *Miller v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-010-10 (April 2011). The ALJ correctly ruled that the prehearing allegations of the Appellant raised issues of fact or law regarding whether the employment actions taken regarding Appellant were in good faith and part of a legitimate reorganization, requiring a hearing.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The OHA is an agency of the State of Oregon, created in 2009. The OHA includes most of the state’s health care programs, including Public Health, the Oregon Health Plan, Healthy Kids, Cover Oregon, and Addictions and Mental Health. The agency has grown quickly both by taking over various existing programs from other agencies and building new programs, such as Cover Oregon. At one point during its maturation process, OHA contained 18 programs and employed 4,400 people.

2. Because of OHA’s rapid growth, and expected delays in obtaining legislative authority to create new, rapidly changing positions, the agency chose to fill many of its employee needs by hiring multiple people to work full time in some individual, legislatively created positions. (This procedure is often called double-filling, although such positions may have more than two employees). The OHA also met some of its workforce needs by continuing limited duration positions past their customary expiration dates.

²A ‘red circled’ wage rate maintains an employee’s higher wage rate after the employee’s subsequent placement in a position with a lower wage rate.

3. Appellant was a registered nurse and management services employee, Principal Executive Manager E (PEM-E) of OHA from its creation until August 2015. At the time of her removal from management service, Appellant's title was Assistant Manager for the Clinical and Quality Services Section in OHA's former Quality Assurance Improvement & Clinical Services Department (a department now subsumed into the new Health Systems Division, Provider Services Program).³ Her salary at the time was \$6998.00 a month.

4. At the time of the events at issue, Appellant had 18 years of experience in government work and 30 years of clinical experience.

5. In early 2015, Saxton directed the OHA division directors and human relations staff to perform functional assessments of the agency departments and management positions (including their own), and reorganize the departments to make them more efficient. This resulted in the conversion of 18 agency entities into seven OHA divisions. She also directed them to identify excess management service positions, both functionally and to align agency structure with the 11 to 1 ratio of nonsupervisory employees to supervisory employees specified by ORS 291.229. Saxton also intended to dramatically reduce the number of double-filled and extended limited duration positions. OHA directors then engaged in a several month process of reviewing their operational needs, staff qualifications and skills, and expected staff retirements or other voluntary separations. Agency leaders concluded that there were significant inefficiencies and overlaps between various management service workers as a result of the combination of programs that had been added to the agency.

6. Initially, agency officials planned to put surplus managerial employees in a resource pool, from which they would be moved to other positions needing their particular skills and experience. However, it became apparent that no OHA divisions needed most of the 30 identified surplus positions, and the resource pool was converted to a layoff pool.

7. Before OHA's reorganization, Appellant oversaw the RN Medical Case Management, Technical Authorization Review, and Behavioral Health Case Management subsections, containing 15 positions. Appellant reported to the Quality Assurance Improvement & Clinical Services Section Manager, who was classified as a PEM F, a higher level classification. That manager, in turn, reported to former Provider Services Section head, now Provider Service Director for Health Systems, Rhonda Busek.

8. Appellant's original position was not a double-filled position. Prior to the reorganization, the non-supervisory/supervisory ratio in her unit was more than 11 to 1.

9. After the reorganization, the multiple work units managed by Appellant became one subsection of the Provider Services section titled Provider Clinical Support. The 15 positions overseen by Appellant were joined by three additional positions, including Appellant in her new, classified position of Medical Review Coordinator. The new subsection was headed by a manager classified as a PEM H.

³Because of the OHA's rapidly changing structure, several relevant OHA subdivisions or components have had multiple names in the time frame at issue in this Recommended Order. Not all of those names are clear in the record, but these variations are not material to the decision in this case.

10. In early June 2015, Busek selected ten individual manager positions to be eliminated from the Health Systems Division, including Appellant and Appellant's supervisor.

11. On Wednesday, July 8, 2015, Busek and an OHA HR Analyst met separately with several individual managers selected for layoff, including Appellant. Appellant was not aware of the purpose of the meeting before attending.

12. Busek was uncomfortable with the situation, and read to each employee from a script provided by OHA human resources staff.

13. The script stated in part:

“ * * * I am sorry to tell you that you have been identified as one of those we will be laying off.

“This action is not easily taken and only after careful review of many options have we made this decision. Here is your layoff notice (hand the letter to the employee and allow them to read).

“Your layoff will be effective August 14, 2015 (37 days from today) which will keep your benefits through the end of September 2015, if you work or have a minimum of 80 paid hours in the month of August.

“* * *

“As you can see in your letter, you have rights back to a previous position. HR will explain those rights to you in a minute.

“This is difficult news and I know this is a shock and recognize you may not even be processing anything at this point. If you need to take leave for the rest of the day you are welcome to do so. If you just need to take a long break and not return to your desk that is okay too. We know this impacts not only you but your family and loved ones and it is not something that we take lightly.

“* * *

“Your letter reflects the rights you have under policy. Because you took your management position prior to January 1, 2015, you have rights to return to a previous represented position for which you held regular status. Your pay and benefits will be reduced accordingly. For example, as a manager you accrue more vacation hours than a represented employee. When you return to a represented status those hours will adjust to where you would have been had you remained represented. If your current pay is over the top step of your represented classification, you will be moved to the top step of that classification.

As an employee with return rights you have 5 days from today to make a decision on whether to return to a represented position or to be laid off in the management

position. You must return your designation to Cheryl Miller, HR Director, no later than Monday at 12 noon. You can mail, hand deliver, scan and email or fax your response. If you fail to meet that timeline, you will be laid off.” (Exh. E-15 at 1-2, emphasis added.)

14. The layoff notice Busek handed to Appellant stated in part:

“This is notification that your current position is being abolished effective August 14, 2015. This action is being taken to support the goals of the Oregon Health Authority reorganization.

“According to the State Human Resource (HR) Policy 50.025.01, Layoff/Removal, you have the following layoff rights:

“As an employee in management service with prior classified service, you have the right to be restored to a position as a Medical Review Coordinator in the Health Systems Division. Please report to work at [location] on August 17, 2015 at 8:00 a.m. Your supervisor is Rhonda Busek. * * * . If you choose not to accept this position, you will be laid off from the Management Service and you will be deemed to have resigned from the Classified Service. *Please notify us of your decision within 5 working days of receipt of this letter.*

“At the time of layoff, you will be placed on Oregon Health Authority’s layoff list as a Principle Executive/Manager E for two years. You may also request that you be placed on the statewide reemployment layoff list for consideration in other agencies for the same, equal or lower classifications.” (Exh. E-12 at 2, emphasis added.)

15. Believing that she was being directed to respond by noon that same day,⁴ Appellant asked the HR representative for a pen and signed the layoff notification sheet, choosing to be restored to classified service.

16. After OHA combined the work section headed by Appellant and her supervisor with another section, to create the Provider Services Program in OHA’s Health Systems Division, the Provider Services Program had a Principal Executive Manager position and no assistant manager positions. Busek did not choose Appellant or her previous supervisor to fill the Provider Services manager position. Instead, Busek chose an individual Principal Executive Manager with a higher level classification than Appellant. The new manager, a chiropractor, was more qualified than Appellant because he had a broader range of experience across the relevant medical fields than Appellant, although this experience was over a shorter time frame in Oregon government

⁴Appellant alleged, and testified, that she was told at the July 8, 2015 meeting that she had until noon that day to sign a form agreeing to termination or accepting restoration to classified service at a reduced rate of pay. The testimony of the other two individuals present was to the contrary, as were the dates in the script Busek read and the layoff letter given to Appellant. We conclude that Appellant, who was distressed at the news of her position’s elimination, was mistaken in her recollection of this part of the meeting.

(five years) than Appellant's deeper experience in fewer relevant medical fields. Busek's choice was based on the functions of the various positions, not past individual manager performance.⁵

17. Appellant was placed in a double-filled classified position.

18. On August 14, 2015, Appellant began work in a classified position as a Medical Review Coordinator, at a salary of \$6,153 per month, \$845 less than her managerial salary, and with reduced vacation accrual and other benefits. This appeal followed.

19. OHA had 'red circled' the wages of other reduced managers before, but there was no uniform past practice or any evidence that other managers similarly situated to Appellant retained their previous salary after moving to classified status. There is no evidence that OHA red circled the wages of any reduced OHA managers in this reorganization.

20. In Appellant's new position, employees continued to treat her as a resource and authority figure. However, she no longer attended management meetings or held any formal managerial responsibilities.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Department's removal of Appellant from management service and reduction in salary did not violate ORS 240.570(2). The removal was part of a legitimate reorganization performed in good faith.

Standards for Decision

ORS 240.570 provides, in part:

“(2) 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.”

Appellant has the burden of proof in this appeal of a nondisciplinary removal from management service due to reorganization. OAR 115-045-0030(6); *Hauck v. State of Oregon, Department of Housing and Community Services*, Case No. MA-1-03 (December 2003); *Rosevear and Tetzlaff v. Department of Corrections*, Case Nos. MA-4/6-97 (February 1998). This Board's review of a reorganization decision is deferential:

“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

⁵Appellant asserted that because of her longer experience, she was more qualified for the position. Appellant did not establish, however, that Busek's contrary opinion was based on bad faith or unlawful criteria.

or second-guess the efficacy of employer decisions.’ *Rosevear, supra* at 11, n. 18 (quoting *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 at 7 (Order on Remand, November 1994)).”

This Board has also 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, supra* at 13.”

Finally, we have stated:

“‘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, supra* at 11.”

Appellant has not met her burden to show that her removal was not in good faith or not part of a legitimate reorganization

The evidence reveals that the OHA has undergone an extensive reorganization for a variety of legitimate reasons. The part of that reorganization affecting Appellant and her work unit was a part of the larger reorganization and was similarly based on legitimate reasons and taken in good faith. While Appellant argues that there were irregularities regarding the manner and timing of her notice of that reorganization, and that she continues to provide direction and act as a resource for other employees, Appellant failed to meet her burden to show that the reorganization, as it affected Appellant, was not legitimate or in bad faith.⁶ Whether OHA followed its own policies in this process is not a basis for reversing its decisions, except insofar as such failure is relevant to a determination that the agency acted in bad faith. *Knutzen v. Dept. of Ins. and Finance*, 129 Or App

⁶Appellant asserted, in her appeal letter and in testimony, that (1) she had been called into the July 8, 2015 meeting without notice; (2) had been informed that she had until noon that day to sign a form agreeing to termination or accepting restoration to classified service at a reduced pay rate; (3) after requesting a copy of the agreement she signed, OHA failed to provide it; (4) OHA categorized her separation in multiple ways; (5) there was a past practice of ‘red circling’ the wages of managers moved back into classified positions; and (6) she continued performing the same work after the position change except for attending OHA management meetings. While it was apparent that Appellant believed that she had been given only until noon July 8, 2015 for her decision, we have determined from all of the evidence in the record that she was mistaken. There was no evidence that OHA managers’ use of the terms layoff, position elimination, or restoration to classified service were inconsistent or contradictory as applied to Appellant. There was no evidence that Appellant’s reduction in salary was inconsistent with the treatment of similarly situated individuals or that the reduction was not part of a good faith legitimate reorganization. The remaining allegations are not material to our decision.

565, 569, 879 P2d 1335 (1994). While Appellant asserted that she could have performed the job of the new manager, there is no evidence that OHA's failure to select her for that position was based on anything besides OHA's determination of its own organizational needs. Appellant's challenge of the loss of salary due to her placement in a classified position is not a management service personnel action listed in ORS 240.570, and this Board does not have "authority to set aside or modify a personnel action that is in violation of a personnel rule." *Knutzen, supra*. The salary changes in evidence here do not suggest bad faith on OHA's part or that the reorganization of Appellant's work unit was not a legitimate one. We will dismiss the Appeal.

PROPOSED ORDER

The Appeal is dismissed.

SIGNED AND ISSUED on 22 January 2016.



B. Carlton Grew
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)