EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-018-15

(MANAGEMENT SERVICE LAYOFF)

TAWANA NICHOLS,	)	
	)	
Appellant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON HEALTH AUTHORITY,	)	AND ORDER
	)	
	)	
Respondent.	)	
	)	

Appellant appeared *pro se*.

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

On April 12, 2016, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service 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 May 4, 2016.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-018-15

(MANAGEMENT SERVICE LAYOFF)

TAWANA NICHOLS, Appellant, v. STATE OF OREGON, OREGON HEALTH AUTHORITY, Respondent.	))))))))))))	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before an Administrative Law Judge (ALJ) on October 15 and December 7, 2015, in Salem, Oregon. The record closed on January 11, 2016, following receipt of the parties' post-hearing briefs.

Appellant Nichols was assisted at hearing by her spouse, Clarence Nichols, a layperson.

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

On September 16, 2015, Appellant filed this Appeal alleging that the State of Oregon, Oregon Health Authority (OHA) had violated ORS 240.570(2) by demoting her and reducing her pay.[1]

The issue is: Was Appellant removed from management service, and dismissed from state service, effective August 14, 2015, during a legitimate reorganization for the good of the service (in good faith for cause) consistent with ORS 240.570(2)?

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

We conclude that OHA removed Appellant from management service, and dismissed her from state service, during a legitimate reorganization for the good of the service and in good faith.

RULINGS

Appellant filed her Appeal by a letter received by the Employment Relations Board (ERB) on September 16, 2015.[2] The letter contained an incorrect email address for the appellant. On September 18, the ALJ sent a letter and email to the parties acknowledging the filing of the appeal. The letter also notified the parties that the hearing would be held within 30 days of the filing of the appeal unless both parties waived that requirement. The letter offered five dates within the 30 day period and stated that the parties' selections were due on September 25. On September 25, OHA selected October 13 or 15 for the hearing. No response was received from Appellant.

Between October 6 and 8, the ERB Hearings Assistant left telephone voicemail messages for Appellant, asking whether Appellant planned to appear at the hearing. Appellant returned some of those calls at times when the Assistant was not present, leaving a message that she had called on the Assistant's voicemail. The notice of hearing, setting the hearing for October 15, was received by the parties on October 9. On the afternoon of October 12, Appellant and the Assistant spoke by telephone. Appellant told the Hearings Assistant that she had discovered that the email address on Appellant's appeal letter was incorrect, and that she had not received any emails regarding her Appeal. Appellant also told the Assistant that she would not be able to attend the hearing on October 15. Pursuant to direction from the ALJ, the Assistant told Appellant to contact Department counsel Yael Livny about postponing the hearing and send the ALJ an email describing why she sought the postponement.

Later on October 12, Livny emailed the ALJ to summarize a telephone call with Appellant. Livny stated that Appellant told her that Appellant may not be able to appear at the hearing unless postponed. Livny also stated:

> "Ms. Nichols * * * asked whether OHA would agree to a postponement of this hearing. Unfortunately, we cannot agree to postpone (waive the 30-day timeframe). We have rearranged schedules to prepare for Thursday's hearing and it is too costly and burdensome to postpone. Given that Ms. Nichols has indicated that she plans on suing the agency in another forum, we will not agree to a postponement of this litigation."

Later that day, Appellant emailed the ALJ and Livny a response stating "I will be appearing."

On October 15, the parties appeared and the ALJ convened the hearing. Appellant appeared without counsel. Appellant asked that the hearing be continued so that she could obtain counsel. Appellant stated that after receiving the notice of hearing she had telephoned several attorneys, and had located an attorney, Michael Van Hoomissen, who would represent her if the hearing were postponed. OHA objected, stating that its participants had appeared despite some hardship, that it

[2]The Appeal, of an employment decision effective August 14, 2015, was postmarked timely on September 14.

had a statutory right to a hearing within 30 days of the appeal's filing, and that Appellant's post-hearing notice efforts to obtain counsel were too late to permit a ruling that Appellant's failure to obtain counsel was good cause for a continuance. The ALJ determined that the Appellant had shown good cause for continuing the hearing, and granted the postponement with the instruction that Appellant direct her counsel to contact Livny promptly.

On October 19, Livny informed the ALJ that she had yet to be contacted by any attorney for Appellant, and asked the ALJ to order Appellant's attorney to contact her to calendar the case immediately or dismiss it for lack of prosecution. Later that day, attorney Van Hoomissen emailed the ALJ and Livny to state that Appellant had contacted him the previous week, his schedule was full the current week (and he was leaving the state midweek for the remainder of the week), he was scheduled to meet with Appellant the following week, and that he would contact Livny as soon as possible after that meeting.

On November 9, 2015, attorney Van Hoomissen emailed the ALJ and Livny, stating in part:

> "This will confirm that Tawana Nichols and I have conferred regarding her appeal, how she should proceed, and the need for any further representation from counsel. We have also conferred with attorney Yael Livny regarding a hearing date. Tawana Nichols prefers a two day hearing on any of the following three dates (12/7, 12/8, 12/9) suggested by attorney Yael Livny. Tawana wishes to represent herself and to proceed pro se. She will soon be filing a shorter amended petition greatly narrowing and clarifying just a few issues for appeal. By copy of this email to Ms. Nichols, I am asking her to confirm this to all the addressees on this email and thereafter I request that attorney Yael Livny and Ms. Nichols and the court to communicate directly and not copy me further."

That same day, Appellant stated that Van Hoomissen's email was "correct and I confirm."

The remainder of the hearing took place on December 7. Having met with counsel and obtained advice, Appellant proceeded without counsel. Her spouse acted as her representative on the record. Appellant did not testify, and did not call any other witnesses.

<u>Continuances for the purpose of obtaining counsel</u>

ORS 240.560(1) provides in part:

> "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly

addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The board shall hear the appeal within 30 days after the board receives the appeal, unless the parties to the hearing agree to a postponement."

OAR 115-010-0070(4) provides:

"Continuances. On the motion of a party or upon his/her own motion, the Board or its agent may continue the hearing. The date of such continued hearing may be fixed at the time of the hearing or by later written notice to the parties."

The ALJ properly granted the continuance as consistent with our rule and the requirements of due process. *See Van Dyke v. State of Oregon, Department of Fish and Wildlife*, Case No. MA-6-01 (November 5, 2002).

Exclusion of Exhibits not exchanged prior to hearing

In an October 6, 2015 pre-hearing order, the ALJ directed the parties to exchange exhibits and exhibit lists by October 8. The letter informed the parties that failure to comply, absent a showing of good cause, might result in the Board refusing to accept the exhibits. Appellant did not identify any proposed exhibits until the reopening of the hearing on December 7. OHA counsel objected to some of the exhibits because Appellant did not list and exchange the exhibit as directed.

OAR 115-010-068(4), which applies to all contested hearings before this Board, provides:

"A party that fails to comply with prehearing requirements set forth in the rule or ordered by the Board or its agent shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown."

This Board has addressed this rule multiple times in decisions under the Public Employees Collective Bargaining Act, and those rulings are applicable to this matter under the State Personnel Relations Law. This Board has stated:

"[T]he purposes of OAR 115-10-068 are to 'streamline proceedings and eliminate undue surprise' and 'facilitate discussion toward possible settlement of the issues.' *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94, 16 PECBR 231, 233 and n. 4 (1995). Also, 'in reviewing representation cost awards, we shall consider a party's failure to comply in a timely manner with an ALJ's prehearing directives.' *Crook County School District, supra*, 16 PECBR at 233, n. 4. The ALJ has the discretion to exclude evidence on the basis of noncompliance with a prehearing notice. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434 (1997)." *Cheryl Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 950 (2005).

The prehearing exchange of exhibits and witness lists is an important part of this Board's hearing process, and this Board routinely excludes proffered exhibits which were not listed or shared pursuant to an ALJ's prehearing order. *Morgan-Tran*, 20 PECBR at 949-51.

Appellant did not show good cause for failing to list and exchange the exhibits. While the time frame prior to the first scheduled date of hearing was short, Appellant had well over a month to prepare and exchange exhibits, and consulted with counsel during this period. The ALJ acted properly within his discretion in denying admission of the exhibits.

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.

3. At the time of her layoff, Appellant was a section manager for the Oregon Medical Marijuana Program and a Principal Executive Manager D (PEM-D). She reported to Steven Wagner, who in turn reported to Lillian Shirley, Director of the Public Health Division of OHA.

4. Appellant had been employed by the State since 1997, first as an Administrative Specialist 1. She was later promoted to Office Manager 2, and ultimately to her PEM-D position. The record does not reveal whether Appellant was promoted directly from the Office Manager 2 position to the PEM-D position.

5. In early 2015, OHA's new director, Lynne Saxton, ordered a comprehensive review of all OHA positions. Part of that review included the number and placement of the agency's management service employees. The Director 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. Also 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.

7. The reorganization of OHA, as it affected Appellant, was also affected by the 2015 legalization of recreational marijuana. Prior to legalization, Appellant's section manager position oversaw 28 employees, including one manager, whose work focused on therapeutic uses, prescriptions, certifications, and cards for purchasing marijuana at special medical dispensaries. After legalization, the OHA was also required to oversee non-medicinal consumer sales and consumption through the existing medical dispensaries. OHA's oversight included all elements of consumer sales, including how the agency and consumers would be informed of the type and qualities of marijuana available for purchase and ingestion in the forms of edible, topical, and smokable items. In order to implement its duties under the legalization law, OHA would have to work with marijuana growers and dispensaries to come up with standards and procedures for recreational sales.

8. In response to legalization, Shirley and Wagner[3] changed the structure of the OHA marijuana section to include employees responsible for oversight of medical and recreational use, including a significant focus on retail quality and quantity control as they affected consumer health. Those changes included expanding the roles of compliance specialists and adding an economist. Other changes implemented goals of moving decision-making to lower levels in the OHA hierarchy. Shirley and Wagner determined that the management of the expanded marijuana section required a manager at the level of a PEM-F. They also added two PEM-E positions, one to supervise fee collection and related matters, and one to supervise marijuana products from grower to dispensary.

9. OHA officials did not believe it was appropriate to promote, or demote, Appellant to fill any other position. In the agency management's view, the decisions regarding agency structure and the appropriate management positions in the new structure were based on structural considerations, not the particular talents, deficits, or circumstances of the individuals who held those positions. In Appellant's case, OHA managers determined, as a matter of organizational efficiency, that the expanded marijuana section did not need a manager at the PEM-D level, and so eliminated Appellant's position.

10. Initially, agency officials put surplus managerial employees in a resource pool, from which they would be moved to other positions needing their particular skills and experience. Appellant was initially placed in this resource pool. However, it became apparent to Department

[3]OHA Human Resources Director Cheryl Miller also participated in this process.

managers that Department divisions needed most of the 30 identified surplus positions, and the resource pool was converted to a layoff pool.

11. Appellant's original position was not a double-filled position. Prior to the reorganization, the non-supervisory/supervisory ratio in her section was more than 11 to 1. Overall, however, OHA had a less than 11 to 1 ratio.

12. On Wednesday, July 8, 2015, OHA issued a notice that Appellant had been selected for layoff effective August 14, 2015. Appellant was on medical leave on July 8, and received the notice upon her return to work on July 16.

13. Appellant's layoff notice stated that she would be placed on OHA's layoff list as a PEM-D for two years. The notice also stated that "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-10 at 1.)

14. Appellant is an African-American woman. The racial composition of the workforce and laid off employees does not appear in the record. The gender composition of the workforce does not appear in the record. Both male and female employees were laid off. OHA has an aging workforce the average age of OHA employees was 45. Most laid off employees were over 45 years in age. There is no evidence that Appellant's selection for layoff was based on her race, gender, or age. There is no evidence in the record that the decision-making surrounding her layoff differed from the process surrounding the 2015 layoff of other OHA managers.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. OHA's removal of Appellant from management service and dismissal from state service did not violate ORS 240.570(2). Nichol's layoff was part of a legitimate reorganization.

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. Board Rule OAR 115-45-030(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 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.

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

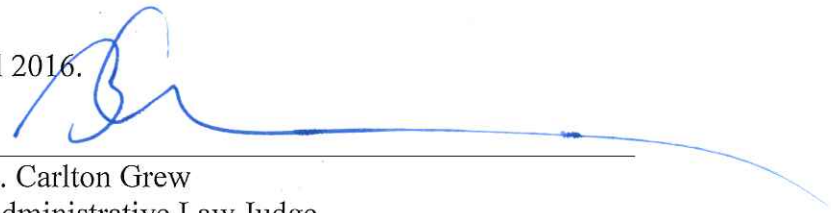
The evidence reveals that the OHA has undergone an extensive reorganization for a variety of legitimate reasons. The part of that reorganization affecting Appellant and her work unit was a part of the larger reorganization, and also designed to meet OHA's new responsibilities regarding recreational marijuana. While Appellant argues that the decision to lay her off was based on her race, gender, disability, medical leave status and age, Appellant failed to meet her burden to show that the reorganization, as it affected Appellant, was unlawfully discriminatory or otherwise illegitimate or in bad faith. While Appellant asserted that she could have been promoted to the PEM-F status of the new section 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. Instead, the record demonstrates that the elimination of Appellant's position was based on structural considerations which are documented in part by OHA's organizational charts. Appellant's status as a PEM-D did not fit within OHA's new structure. There is no evidence in this record that OHA considered individual attributes of the individual managers laid off, including

their race, age, gender, or even their performance. In short, there is no evidence suggesting that Department officials acted in bad faith or that the substantial 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 12 of April 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.)