

objects to our consideration of two of those documents—the affidavit of a human resources manager, and a packet of policies of the Oregon Department of Administrative Services (DAS)—on grounds they were not submitted or argued as part of this record. The objections are well taken.

The affidavit concerns the status of the position from which Bellish was demoted, and it is purportedly based on the affiant’s review of Department of Human Services (DHS) records. Neither the affidavit itself nor the documents on which it relies are part of the record, and the State has not asked us to reopen the record to admit the affidavit into evidence.¹ This Board may not consider factual evidence outside of the record the parties made at hearing. ORS 183.450(2); *Arlington Education Association v. Arlington School District*, 177 Or App 658, 34 P3d 1197 (2001), *rev denied* 333 Or 399, 42 P3d 1243, 1244 (2002). We will disregard the affidavit because it is not part of the record, and we will similarly disregard any arguments based on the affidavit.

The State also submitted a series of personnel policies from DAS. These policies are not part of the record, and the State does not ask us to reopen the record to include them. Instead, it asks us to take official notice of the policies. Official notice is an exception to the rule that we can consider only facts in the record. ORS 183.450(2). Agencies “may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within [their] specialized knowledge * * *.” ORS 183.450(4). This Board has discretion about whether to take official notice. *Arlington Education Association*, 177 Or App at 663. We choose not to exercise that discretion here.

The proffered policies are long and complex, and if accepted into evidence, would require us to reopen the record for further evidence about their meaning and application, and about other policies that might be pertinent. OAR 115-01-005; OAR 137-003-0615. We are unwilling to do so at this late stage of the proceedings, after we have issued a final Order. This is especially true in light of the State’s failure to explain why it did not introduce and argue the relevance of the policies at any earlier stage, even though the policies were in existence long before the hearing.

We will disregard the DAS policies and any reliance on them in the State’s arguments

¹Even if the State had asked us to reopen the record, we would have declined. The information in the affidavit was largely available at the time of hearing, and the State has offered no good cause for its failure to introduce the evidence at that time.

DISCUSSION

We ordered the State to reinstate Appellant to the position from which he was demoted. In a footnote appended to the Order, we observed that the position has been "reclassified." The State takes exception to the footnote. It asserts that there is no substantial evidence in the record to support the statement that the position was reclassified.

The record reveals the following: The State demoted Bellish from a position with a Principal Executive Manager (PEM)/D classification, and it posted the vacancy for his position at the same classification. At some point, however, after he appealed his demotion to this Board, the State decided to combine the responsibilities of Bellish's job with other duties. It rescinded the initial posting and reposted the expanded position with a PEM/E classification. Bellish had been the highest State manager in the Hillsboro office; the new posting was for the highest State manager in that office. All of Bellish's prior job responsibilities, along with some new ones, were part of the posted position.

In our footnote, we were referring to the facts recited above. We described them with the shorthand label of "reclassification." With this clarification of what we meant by the term, we adhere to our original statement.

The State seeks to attach a shorthand label of its own. It argues that Bellish's old position was abolished and a new one was established. The evidence does not support this contention. The State's witness chose her words carefully. She testified that the transaction should be "considered" an abolishment of the existing position and establishment of a new one. The witness based her statement not on any action the DHS took here, but rather on the history in the DHS in a prior reorganization. There is no evidence as to whether the prior reorganization bore any resemblance to this one. More importantly, the State has pointed to no evidence in the record that proves the DHS *in fact* abolished the position and established a new one. We know only that one witness "considered" it to be so. We reject the State's attempt to characterize its action as an abolishment of one position and the establishment of a new one.

The real dispute underlying this semantic tug-of-war (reclassification vs. abolishment/establishment) concerns the position to which we ordered the State to reinstate Bellish. As required by ORS 240.560(4), we ordered the State to reinstate Bellish to the position in Hillsboro from which he was demoted. The State now asserts that the position no longer exists. Its witness testified DHS would relocate him to a similar position

in the same classification in a DHS office in Klamath Falls.²

Neither party cites, and we have not found, any cases dealing with the meaning of the words “the position” as used in ORS 240.560(4). We therefore begin our analysis by examining the text of the statute in context. We give words of common usage in the text “their plain, natural and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). Context includes other provisions of the same or related statute. *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997). If the legislature’s intent is clear, there is no need to pursue further steps in the analysis.

ORS 240.570(3) describes the grounds for various personnel actions against a management service employee, including demotion. ORS 240.570(4) permits an employee to appeal these actions to this Board. ORS 240.560(4), the provision at issue here, states in pertinent part that if this Board finds a demotion to be unjustified, it “shall order the immediate reinstatement and the reemployment of the employee in the position without the loss of pay.”

The statute does not define the phrase “the position.” However, the legislature’s use of the definite article “the” indicates an intent to refer to a previous part of the statute. *Osborn v. PSRB*, 325 Or 135, 142, 934 P2d 391 (1997); *Nielson v. Myers*, A113071, ___ Or App ___ (May 12, 2004). In context, this can only refer back to ORS 240.570(3) and the position from which the employee was demoted. Use of “the” also denotes a particular specified thing, not a general, unspecified class of things. *Anderson v. Jensen Racing, Inc.*, 324 Or 570, 578-579, 931 P2d 763 (1997). This also indicates a legislative intent to refer to the particular position from which the employee was demoted rather than to a more general classification which includes this particular position.

This interpretation is further bolstered by the statute’s use of the terms “reinstatement”³ and “reemployment” when describing “the position.” Under the common meaning of these terms, an employee can only be reinstated to or reemployed in a position

²The State asserts that Bellish could have applied for the new PEM/E position in Hillsboro, and that he lost any right to it by his failure to apply. This is unrealistic. The DHS had just disciplined Bellish by demoting him from a PEM/D to a PEM/B and moved him to a different office. In these circumstances, we conclude it would have been futile for Bellish to apply for a position with even greater pay and responsibility than the one from which he was demoted. As a practical matter, the DHS’s unlawful demotion deprived Bellish of any realistic chance to get the PEM/E position in Hillsboro.

³“Reinstatement” means “place again (as in possession or in a former position).” *Webster’s Third New International Dictionary 1915 (unabridged ed. 1981)*

the employee previously held. We conclude that the phrase “the position,” as used in ORS 240.560(4), refers to the position from which the employee was unlawfully removed.

The State argues that the statutory scheme should be altered because the position from which Bellish was unlawfully demoted no longer exists. Even if we assume (without deciding) that the statute might, in some circumstances, permit the DHS to place Bellish in a new position if the old one no longer exists, we conclude that this is not such a circumstance. As an initial matter, the State must demonstrate that the position no longer exists for a legitimate reason. The State has failed to make this threshold showing.

Bellish filed a timely appeal of his demotion and asked this Board to return him to his prior position. The position existed when he filed the appeal, and the State was on notice that he sought an order returning him to that position. After Bellish filed his appeal, the DHS changed the position description, and its witness later testified that if Bellish won his appeal, he would be offered a position in Klamath Falls. This is hundreds of miles away and would uproot Bellish from the community in Hillsboro where he lived and worked for many years.

Bellish argues that DHS’s position appeared to be “cooked up for hearing.” We agree. On its face, the DHS’s course of action would prevent this Board from awarding Bellish the reinstatement to which he is entitled by law. DHS’s action in this regard was not taken in good faith.

We know only that the DHS made the change to his position after Bellish filed his appeal. There is no evidence that the DHS was contemplating that change before the appeal. The fact that the change followed closely after Bellish’s appeal raises an inference of a causal connection between the two. See *Days Creek ACE v. Days Creek School District*, 16 PECBR 187, 200 (1995). On this record, the State has not overcome the inference. There is little evidence that it made the change in Bellish’s position in good faith, for legitimate business reasons. We have some evidence about what the reorganization entailed, but little to indicate that it advanced any legitimate interests of the DHS. The DHS had recently undergone a major reorganization, but it did not change Bellish’s position as part of that reorganization. Instead, it waited until Bellish filed his appeal. There is no indication of changed circumstances that would explain why the DHS saw no need to include Bellish’s position in its earlier major reorganization, but then deemed the change appropriate after he was demoted and filed this appeal. Further, we find it significant that Bellish appears to be the only one who lost his position in this change.

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

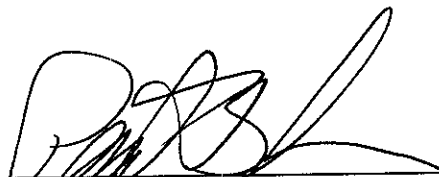
of the organization. A legitimate reorganization is not contrived or a sham for some other purpose." *Rosevear and Tetzlaff v. Department of Corrections*, page 11, Case Nos. MA-4/6-97 (February 1998).

Although we made this statement in a slightly different context, it applies here. The statute requires us to return Bellish to "the position" from which he was demoted. The State asks us to place Bellish in a different position than the one from which he was demoted. It asserts that "the position" no longer exists due to an alleged reorganization. The State has the burden of proving that any such reorganization was legitimate. OAR 115-45-030(6). It has failed to demonstrate a legitimate reason for its change to Bellish's position after he was demoted and filed this appeal. The evidence and arguments proffered at hearing and in its motion do not present a reason to depart from our original Order that Bellish be reinstated to the position in Hillsboro from which he was demoted.

ORDER

Reconsideration is allowed. The decision and order of April 1, 2004, is adhered to, as explained and clarified herein.

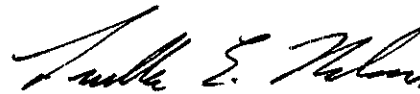
DATED this 14 day of June 2004.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482