

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-2-04

(MANAGEMENT SERVICE APPEAL)

ELIZABETH LOPEZ,)	
)	
Appellant,)	
)	
v.)	RULING ON RESPONDENT'S
)	MOTION FOR
STATE OF OREGON,)	RECONSIDERATION
DEPARTMENT OF HUMAN SERVICES,)	
SENIORS AND PEOPLE WITH DISABILITIES,)	
)	
Respondent.)	
_____)	

On July 29, 2005, this Board issued an Interim Order which concluded that we have jurisdiction over Appellant's appeal of her dismissal from State service. On August 12, 2005, Respondent filed a timely motion for reconsideration. On August 19, 2005, Appellant filed a timely response in opposition to the motion. We grant reconsideration and adhere to our original order.

The Administrative Law Judge (ALJ) bifurcated the hearing and took evidence solely on the issue of this Board's jurisdiction. The State argued that Lopez was an unclassified service employee under ORS 240.205(4); Lopez argued that she was a management service employee under ORS 240.212. There is no dispute that we have jurisdiction over Lopez' appeal if she was in management service, and that we lack jurisdiction if she was in unclassified service.

We examined the evidentiary record developed by the parties, and interpreted and applied the relevant statutes. On this record, we concluded that the

State failed to prove all of the statutory elements necessary to make Lopez an unclassified employee under ORS 240.205(4). We further concluded that Lopez was in management service at the time of her dismissal and that this Board therefore has jurisdiction over her appeal. We remanded the matter to the ALJ for further proceedings on the merits of the appeal.

The State moves for reconsideration. According to the State, the reason for its motion "is that the Interim Order is not supported by the evidence, arguments and/or testimony presented at the time of the hearing and on the record." The State does not identify any particular finding of fact that is not supported by evidence in the record, or any pertinent fact that was omitted from our findings. We therefore reject this assertion without further discussion.

The real crux of the State's motion is that this Board relied on an argument that was not raised by the parties. It specifically points to this Board's analysis of whether Lopez met the definition of an unclassified employee under ORS 240.205(4). According to the State, this Board raised and decided the statutory question on its own and the State did not have notice that it should produce evidence on the issue. The State's argument fails for two reasons, one factual and one legal.

Factually, the State itself raised the issue. It asserted twice in its post-hearing brief that Lopez was in unclassified service under ORS 240.205(4). Indeed, that was the entire basis for its argument, *i.e.*, that Lopez was in unclassified service and therefore beyond this Board's jurisdiction. Lopez, in her post-hearing brief, specifically asserted that the State failed to prove that Lopez met all of the requirements to be in unclassified service as defined in ORS 240.205(4). This argument was the basis of this Board's decision. Contrary to the State's assertion, this Board did not raise the issue on its own.¹

¹The ALJ stated the issue as follows: "As of February 17, 2004, was Elizabeth Lopez' position with the Department of Human Services, Seniors and People with Disabilities (Department) in management service or unclassified service?" The State did not object to this issue statement. See OAR 115-10-090 (allowing parties to file written objections to an ALJ's recommended order). Given that the issue is whether Lopez was in management service or unclassified service, it does not seem surprising that this Board would consider the statutory definitions of those terms

Legally, even if this Board had raised the argument on its own, it would not matter. When the construction of a statute is at issue, its meaning is for courts to decide, and they can do so based on arguments that were never raised by the parties. *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 16-17, 56 P3d 386 (2002); and *Nibler v. Dept. of Transportation*, 338 Or 19, 21, n 1, 105 P3d 360 (2005).²

The meaning of ORS 240.205(4) was at issue. Both parties relied on the statute in their briefs. The heart of the dispute is whether Lopez was in “unclassified service,” so the pertinent portion of the statutory definition of that term was clearly in play. Once the meaning of the statute was placed at issue, we were entitled to interpret it based on arguments that were not raised by the parties. Thus, even if we assume for the moment that the State is factually correct in asserting that we raised the argument on our own, it nevertheless does not identify an error in our order.

The State also asks us to reopen the record so it can “respond and present evidence contrary to the Board’s interpretation and application of ORS 240.205 to this case.” We are typically reluctant to reopen an evidentiary record after the hearing has been completed. Otherwise, a losing party could embark on a course of never-ending litigation by continuously seeking to reopen the record to offer more evidence. Considerations of finality, stability and efficient use of our scarce resources militate against reopening the record unless good cause is shown by the party seeking to reopen. For example, in *Plank v. Department of Transportation*, Case No. MA-17-90 (March 1992), we rejected a post-hearing offer of evidence and noted that there was no showing that the documents were unavailable at hearing or newly discovered. In *Wilson v. Oregon State Police*, Case No. MA-30-94 (June 1995), we rejected a post-hearing motion to remand

²The State cites *Cret v. Employment Department*, 146 Or App 139, 932 P2d 560 (1997), for the proposition that this Board cannot *sua sponte* decide issues not raised by the employer or the ALJ. *Cret* is inapposite for at least three reasons. First, the court in *Cret* ultimately decided to review those issues the Employment Appeals Board raised on its own. Second, *Cret* involved issues not raised by the employer or the ALJ. Here, the employer, the employee, and the ALJ all raised the issue of whether Lopez was in unclassified service. Third, to the extent the State reads *Cret* as prohibiting us from raising arguments on our own regarding the interpretation of a statute at issue, it is contrary to the more recent Supreme Court decisions in *Newport Church of the Nazarene* and *Nibler*, and therefore not controlling authority.

the case to an ALJ to receive further evidence because the proffered evidence was available at the time of hearing. Here, the State does not identify any new evidence or explain why it was not reasonably available at hearing. In the absence of good cause shown, we deny the State's motion to reopen the record.

ORDER

1. Reconsideration is granted. We adhere to our Interim Order of July 29, 2005.

2. The State's motion to reopen the record to present further evidence on the jurisdictional issues is denied.

DATED this 12th day of September 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member

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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

* Member Kasameyer Concurring:

I wish to add an additional comment. Unlike my colleagues, I would not prohibit the State from presenting further evidence on jurisdictional issues as part of the remand phase of these proceedings.