

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-007-10

(MANAGEMENT SERVICE - INVOLUNTARY REASSIGNMENT)

KARLA KELLER,)	
)	
Appellant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT)	AND ORDER
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on October 15, 2010, following a hearing on July 29, 2010, in ERB's offices in Salem, Oregon. The hearing closed upon receipt of the post-hearing briefs on August 19, 2010.

Paul Spencer, Attorney at Law, Portland, Oregon, represented Appellant Karla Keller.

Tessa M. Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Transportation.

Appellant Karla Keller (Keller) works for the Oregon Department of Transportation (ODOT). She timely appeals her involuntary reassignment from her position as the Highway Division's Manager of Maintenance and Operations in Portland to the same position in Salem.

The issue is whether Keller's reassignment from ODOT's Region 1 Maintenance and Operations Manager in Portland to the same position in Salem was for the good of the service pursuant to ORS 240.570(2).

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDING OF FACTS

1. Karla Keller is a management service employee who works for the Oregon Department of Transportation, a state agency.

ODOT's Organizational Structure

2. ODOT oversees the State's transportation system, including state and federal highways, bridges, railways, public transportation, licensing, and motor carrier regulation. It employs approximately 4,500 people and has multiple divisions, referred to as business lines, each with its own chain of command leading up to ODOT Director Matthew Garrett. These divisions operate independently of each other, but work collaboratively as agency needs arise.

3. ODOT's highway division divides its maintenance operations into five geographic regions, each with multiple districts, in order to serve these areas locally rather than from one centralized location. Each region has a regional manager who is responsible for transportation operations in his or her area.

4. Region 1 encompasses the metropolitan Portland area and extends into the Columbia River Gorge and as far east as Mount Hood. Region 1 has more population and traffic density, media coverage, and operational complexity than any other region. The region 1 manager is Jason Tell, who reports to Highway Division Deputy Director Doug Tindall.

5. Region 2 is based in Salem and includes a larger geographical area than region 1, ranging from north of Salem to Eugene in the south, and from the coast to the Cascade mountains in the east. Although it has lower population and traffic density than region 1, the geographic challenges of coastal, mountain, and valley roadways present their own significant maintenance problems. Region 2 includes 9 counties, 90 cities, and 97 stakeholder groups. The region 2 manager is Jane Lee.

6. Each region has a regional manager for maintenance and operations (RMOM). The RMOM reports to the region manager and administers a multi-million dollar budget that involves all aspects of state highway operations in that region. In region 1, the RMOM supervises a staff of approximately 330 people; in region 2, the RMOM supervises a staff of approximately 325 people.

7. Regions 1 and 2 are organized along similar lines and the duties of the RMOM in each region are comparable. These duties include managing State highway construction and re-paving projects, pothole repairs, striping, and emergency response to traffic accidents, mudslides, winter storms, and other natural disasters. In emergency or natural disaster situations, the RMOM may assume the position of incident commander with operational duties of coordinating Department personnel and resources to comply with state or federal requirements.

8. The RMOM must work and collaborate with other ODOT divisions, various federal, state, county, and municipal agencies, media, and the public. The maintenance and operations division and the communications division frequently work together, but they have separate business lines with their own managers.

9. Patrick Cooney is the communications division manager. David Thompson, who reports to Cooney, is the public information services manager. Thompson supervises the public information officers (PIO) in the communications division. A PIO's duties include fielding media and public inquiries about ODOT-managed operations; giving interviews to radio, television, and print media; and providing public relations support to other ODOT divisions as resources allow. Typically, the division assigns a PIO to each region to coordinate media and public communications, especially during emergency situations.

Facts Giving Rise to the Complaint

10. ODOT hired Keller as a full-time employee in 1986, and she has served in management positions there for approximately 19 years. In her rise through the agency, she held numerous positions, including federally-funded projects reviewer, project manager, regional assurance director, assistant district manager in Salem, and region 1 district manager. In 1998, ODOT promoted her to the RMOM position for region 1.

11. In 2007, Christine Miles (Miles) was employed in the communications division as a PIO and was assigned to work in region 1 where Keller was the RMOM.

12. During the 2007-2009 period, the professional relationship between Keller and Miles deteriorated to the point that they had difficulty collaborating when their job functions required it. Although the reasons for the strained relationship were based on both personal and professional differences, the two women were unable to resolve their issues between themselves. Keller never had similar issues with any of the five or so previous PIOs assigned to work with the maintenance and operations division.

13. In June 2008, Miles filed an internal complaint against Keller alleging harassment and retaliation. Department of Justice (DOJ) Assistant Attorney General Linda Kessel investigated Miles' complaint. She interviewed 23 witnesses and examined extensive written materials, telephone logs, and e-mails. On October 16, 2008, ODOT Employee and Labor Relations Manager April Makalea informed the parties that the investigation identified some performance issues relating to Miles, but that the allegations of harassment and retaliation were not sustained. The investigation was closed.

14. In September 2008, Keller filed an internal complaint against Miles for harassment, retaliation, and creating a hostile work environment. The substance of the complaint was that Miles did not communicate information within Keller's business line according to established practices, did not return pages or phone calls, failed to follow up on assigned tasks, and showed disrespect by walking out of a group meeting when Keller was speaking.

15. ODOT's human resources employees Richard Fraser and Mary Ingersoll investigated Keller's complaint. On November 24, 2008, Martha Smith, the coordinator for ODOT's Office of Equal Employment Opportunity, Affirmative Action and Americans with Disability Act (EEO/AA/ADA), informed Keller of the results of the investigation:

“* * * the information does not support a violation of policy based on harassment, retaliation or hostile work environment. Based on the information you provided, the behaviors and communications occurring between you and Ms. Miles during the time period reviewed, appear to be examples of a poor working relationship between both of you, a lack of trust, and an on-going struggle to establish and maintain a professional working relationship.

“ODOT Human Resources, in conjunction with the appropriate managers, will be working with you and Ms. Miles to develop a plan for how the two of you can create a more constructive working relationship.”

16. In January 2009, Keller wrote to her manager, Jason Tell, informing him that Miles was "meddling" in her business line and was continuing to act unprofessionally towards her.

17. On March 6, 2009, Keller's and Miles' managers, Jason Tell and Patrick Cooney, wrote to the women that it was time to ensure a positive work environment, not only for Keller and Miles, but for the other employees who interacted with them daily. The discord between Keller and Miles had begun to draw in other ODOT employees and managers, who were asked to provide statements to investigators or to support one side or the other. Tell described it as having a ripple effect on the organization as more people became aware of the situation.

18. ODOT arranged for Management Consultant Judy Clarke to facilitate private and joint discussions among the two women and their managers, and to make recommendations for improving the situation. The process was to be completed by July 2009, but continued for several months after that without a satisfactory resolution of the issues between Keller and Miles.

19. Keller became dissatisfied with ODOT management's lack of action to curtail what she perceived as Miles' problematic behavior and, in June 2009, she filed an internal complaint against Miles for harassment and retaliation, and against Miles' Communications Division Manager Cooney and Public Information Services Manager Thompson for collusion to create a hostile work environment and for violating ODOT's internal policy for maintaining a professional workplace. The complaint also alleged dereliction of managerial duty by Cooney and Thompson.

20. On June 30, 2009, Human Resources Manager Richard Fraser referred Keller's complaint to ODOT's Office of EEO/AA/ADA, which in turn referred it to DOJ Senior Assistant Attorney General Jonathan Groux for investigation.

21. On August 31, 2009, Management Consultant Clarke wrote to HR Manager Fraser informing him "that Karla and Christine, under the current structure, could not effectively work together long term." She also wrote that "Christine's supervisor, Dave Thompson, had lost objectivity, making it more a personal issue than about resolving operational issues." Clarke characterized the problems between Keller and Miles as indicative of a larger issue regarding the lack of clarity between the roles of the highway division and the communications division.

22. On October 2, 2009, ODOT's Chief Human Resource Officer, Mark Coolican, wrote to Keller informing her that, effective November 1, 2009, and until further notice, she was reassigned to Salem as Region Manager, Operations Programs, Highway Division Region 2. The stated reasons included the need to address the

personnel issues stemming from the interactions between Keller and Miles and their respective supervisory chains, which had the potential to disrupt the business operations in region 1. He also referenced the need to improve cross-jurisdictional coordination between region 1 and region 2. Because the reassignment involved no change in job classification, Keller's compensation and benefits remained the same. Keller resides in Portland, so ODOT provided her a State car for her commute, allowed her to work flexible hours to accommodate her school-age daughter's schedule, and allowed her to telecommute.

23. At the same time as Keller's reassignment, Miles was reassigned out of the Portland region.

24. Keller made the involuntary transition to Salem. On November 2, 2009, region 2 manager Jane Lee issued a memorandum to staff indicating that, among her other duties, Keller would be assigned to improve operational consistency between regions 1 and 2, and draft contract language for a pilot program that would allow outside contractors to maintain approximately 30 miles of State highways. The pilot project contract was a complex task that Lee would otherwise have to do herself.

25. On February 9, 2010, EEO/AA/ADA Coordinator Martha Smith wrote to Keller, Miles, and their respective managers that Assistant Attorney General Groux had completed the DOJ's investigative report. In the course of his investigation, Groux interviewed 13 people and examined e-mails and correspondence, phone records, organizational charts, and ODOT's policies relating to Discrimination and Harassment-Free Workplace and Maintaining a Professional Workplace. Smith wrote that Groux had found:

"insufficient evidence to support the allegations of sexual harassment and retaliation by Christine Miles, or collusion to create a hostile work environment by Patrick Cooney, David Thompson and Christine Miles, or dereliction of managerial duty by Patrick Cooney and David Thompson per the 'Discrimination and Harassment-Free Workplace' * * * policy.

"Federal and state law, as well as state policy, protects individuals from being retaliated against because of their involvement in an investigative process. Everyone involved in the process—a person bringing forward a complaint, witnesses, and the accused—may not be subjected to or subject others to retaliation."

26. In March 2010, Keller began asking about her return to Portland. Although she initially was given some positive indications, when she asked her former managers

when that might occur, they did not respond. Instead, on April 6, 2010, Deputy Director Tindall informed Keller via e-mail that her reassignment to region 2 was permanent and that she was to assume the duties of the RMOM there. Tindall wrote:

“[a]s we discussed this morning, the agency needs your talents in Region 2 on an ongoing basis. You are being re-assigned as the Region 2 Region Maintenance and Operations Manager (RMOM) at your current classification and salary. The timing and wording of the formal announcement will be worked out between you and Region 2 Manager Jane Lee.

“Because this reassignment is made to benefit the agency we will continue to provide a vehicle for you to get to work until such time as you move from your current home. There is no requirement that you move, but if you do, we will need to reassess the need to provide a vehicle (we may cease to provide a vehicle if you choose to move to close proximity to the Region 2 office).

“The agency appreciates your talents and believes they will greatly benefit Region 2.

“Please call if you have any questions.”

27. On April 13, 2010, Risk Manager Penny Repine stopped by Keller’s office where the two discussed the fact that Keller had filed a tort claim notice seven days earlier. Keller construed Repine’s response as discouraging her from proceeding.

28. After Keller left region 1, Region 1 Manager Jason Tell described the division as operating as well as ever. He observed that morale had improved and that there had been no problems between the new RMOM and the new PIO despite no change in operating procedures.

29. Absent reasons involving discipline or nepotism, involuntary transfers are unusual but not unprecedented at ODOT. On at least one previous occasion, an employee was involuntarily transferred for non-disciplinary reasons based solely on the best interests of the agency.

CONCLUSIONS OF LAW

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

2. Keller's involuntary reassignment from her position as the region 1 RMOM to a position as the region 2 RMOM did not violate ORS 240.570(2).

Pursuant to OAR 115-045-0030(6), Keller bears the burden of proof and the burden of going forward with the evidence in this appeal of her non-disciplinary reassignment. She argues that because her reassignment from Portland RMOM to Salem RMOM was not disciplinary, it must be retaliation for filing complaints against Miles, Thompson, and Cooney. She further alleges that her reassignment was not for the good of the agency because since her departure, region 1 has experienced numerous operational complaints and poor media coverage. She contends that, notwithstanding her legitimate complaints against Miles, management failed to support her and instead involuntarily reassigned her to the less-operationally complex Salem region for which she is vastly overqualified.

Keller also alleges ODOT violated her rights under ORS 659A.199 and ORS 659A.203(1)(b)(A) and (B). Those statutes, sometimes referred to as the whistleblower statutes, make it an unlawful employment practice to discharge, demote, suspend, discriminate, or retaliate because the employee has, in good faith, reported information that the employee believes is evidence of a violation of a state or federal law, rule, or regulation. Apart from the fact that Keller did not specify which state or federal law, rule, or regulation was violated, or exactly who at ODOT violated it, the appropriate venue for these allegations is the Bureau of Labor and Industries or through a civil action in state or federal courts. This Board does not have jurisdiction to hear complaints of this nature and, consequently, we will not address these arguments further.

ODOT argues that it had legitimate reasons for the reassignment based on personnel and operational concerns and that, under ORS 240.570(2), it is entitled to reassign employees as it deems appropriate to further the best interests of the agency.

ORS 240.570(2) provides that "[a]n 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." We do not have the authority to "do equity" or second-guess the efficacy of management transfer decisions. *Moisant v. Children's Services Division*, Case No. MA-16-86 at 17 (December 1987). Our review of management transfer decisions is limited. In *Downs v. Children's Services Division*, Case No. MA-12-90 at 16 (January 1992), we explained:

"[t]his very limited scrutiny of management service transfers reflects our belief that the Legislature, in creating the management service and choosing as broadly phrased a directive as 'good of the service,' intended

that state employers be free to exercise substantial discretion in determining how best to utilize their own management personnel in the pursuit of agency objectives. Conversely, we believe the Legislature did not intend that this Board use its review authority to impose its own views of good management practices or industrial fairness on state agency employers.”

In *Rau v. State of Oregon, Department of Parks and Recreation*, Case No. MA-2-01 at 5 (January 2002), we stated that determining whether an assignment, reassignment, or transfer of a management service employee was for the “good of the service,” as provided in ORS 240.570(2), turns on whether the action was arbitrary. To determine whether the action was arbitrary, we examine “whether the agency action was supported by substantial evidence, i.e., whether there was some rational basis for the agency action.” *Id.* (quoting *Becks v. Children’s Services Division*, Case No. 1478 at 5 (May 1985)).

In *McGee v. Department of Human Services*, 195 Or App 736, 741, 99 P3d 337 (2004), the Court of Appeals addressed the applicable standard under ORS 240.570(2):

“the language of subsection (2) focuses on what will be the *effect* of a reassignment on the agency as a whole, *i.e.*, whether it is for ‘the good of the service.’ As the board acknowledged in its opinion, its standard of review is limited to whether the department acted arbitrarily. Accordingly, while the motivation of the department may be a factor in determining whether it acted arbitrarily, ultimately ORS 240.570(2) requires the board to assess additionally whether the department’s action resulted in a reassignment that was for ‘the good of the service’.” (Emphasis in original.)

Keller is unquestionably a highly-competent and experienced manager, but the personal and professional differences between her and Miles, which remained unresolved after nearly three years, had a disruptive effect on other ODOT employees. As described by Keller’s manager, Jason Tell, the resulting tension had a ripple effect within the department as an increasing number of employees and managers became aware of, and ultimately drawn into, the dispute between Keller and Miles. Some employees were interviewed more than once during the course of three separate investigations and some were asked to take sides. The strained relationship interrupted the flow of communications regarding maintenance operations as Miles or Keller attributed improper motives or unprofessional actions to one another. Keller was frustrated by her perception that Miles was circumventing or disregarding established division practices and acting unprofessionally towards her. She also believed that the Communications Division’s managers failed to support her or appreciate the seriousness of Miles’ behavior. Miles thought Keller demonstrated harassing and retaliatory behavior to a degree that she felt compelled to file her own complaint.

Although Keller did nothing that warranted discipline, the unresolved situation became a distraction. When the management consultant brought in to facilitate a resolution expressed her opinion that “Karla and Christine cannot work together long term,” it became apparent that further efforts at reconciliation were not likely to succeed. In fairness, the consultant attributed part of the problem to confusion over lines of authority between the two divisions. Keller testified, however, that she did not have similar problems with any of the five or so previous PIOs assigned to region 1, a statement that suggests a personal, rather than an organizational, problem. At this point, there was no easy solution. ODOT decided to reassign both Keller and Miles out of the region at the same time.

Keller asserts that the highway division in region 1 suffered negative publicity since her departure and contends that had she remained, such publicity and operational problems would not have occurred. That opinion was credibly contradicted by Jason Tell, who testified that the division was operating as well as ever, that morale had improved, and that there were no problems between the new RMOM and PIO despite no change in operating procedures. More fundamentally, we are reluctant to examine the agency decision in hindsight to determine whether it worked as expected. The standard is not whether the decision worked, but whether the decision was arbitrary when it was made. We conclude it was not, and we express no opinion on whether it was a “good” business decision.

Keller also argues that she is vastly overqualified for the RMOM position in Salem, thus implying that her managerial talents are not being maximized. A comparison of the two regions, however, shows that they are organized along similar lines, the duties of the RMOM in each region are identical, the number of employees reporting to the RMOM in both regions is essentially the same, and the geographic challenges presented by coastal, mountain, and valley roadways in 9 counties, 90 cities, and 97 stakeholder groups in region 2 are at least as significant as region 1. While it is true that there are differences between the two regions—population, traffic density, and media exposure in region 2 are considerably less than in region 1—Keller did not present evidence that she was the only person capable of handling those duties. As a result, her argument that she is vastly overqualified for the RMOM position in region 2 is unpersuasive. She has failed to demonstrate that the decision to transfer her to region 2 was arbitrary and not for the good of the service.

In addition to ending the distractions, ODOT incurred other tangible benefits by assigning someone as experienced as Keller to the region 2 RMOM position. Her past experience working in Salem meant that she was already familiar with maintenance operations there and, as Deputy Director Tindall pointed out when he informed Keller

of her permanent appointment, her reassignment would facilitate coordination of operations between the two regions which was for the good of the agency. In addition, Region Manager Jane Lee was able to immediately delegate to Keller complex projects that she would otherwise have to do herself, including negotiating contracts for a pilot project that involved contracting out highway work to outside contractors.

Finally, Keller received no reduction in salary, job classification, or benefits as a result of the reassignment. If, as Keller contends, the reassignment was purely retaliatory, it is not likely ODOT would have accommodated her as much as it did by providing a State car, flexible hours to coordinate her schedule around her daughter's activities, and the option to telecommute as needed.

Three investigations and the management consultant all identified issues between Keller and Miles that had limited prospects for a good, long-term working relationship. The highway and communication divisions must have a clear and collaborative relationship, especially during emergencies. By taking steps to ensure that relationship remained functional, ODOT acted reasonably and in the best interests of the agency as a whole. We cannot conclude that ODOT acted arbitrarily by reassigning Keller from region 1 to region 2. Accordingly, we dismiss this appeal.

ORDER

The appeal is dismissed.

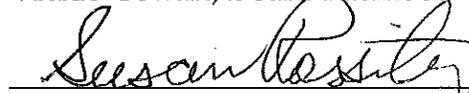
DATED this 23 day of December 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.