

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-11-06

(CLASSIFIED SERVICE—LAYOFF)

DAVID HAYS,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
STATE OF OREGON, DEPARTMENT	)	AND ORDER
OF ADMINISTRATIVE SERVICES,	)	
	)	
Respondent.	)	
_____	)	

On September 5, 2007, this Board heard oral argument on Appellant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Susan Rossiter on June 26, 2007, following a hearing conducted by ALJ B. Carlton Grew on January 9, 2007, in Salem, Oregon. The record closed with the submission of briefs on February 9, 2007.

Spencer C. Rockwell, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Appellant.

Linda J. Kessel, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street NE, Salem, Oregon 97301-4096, represented Respondent.

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On August 25, 2006, the State of Oregon, Department of Administrative Services (DAS), laid off Appellant David Hays from his position in the classified service. Appellant timely appealed his layoff, asserting that DAS' decision to lay him off violated ORS 240.086(1).

The issue presented for hearing is: Was DAS' decision to lay off Appellant arbitrary or contrary to law, rule, or policy, or taken for political reasons, within the meaning of ORS 240.086(1) and OAR 115-045-0020(1)?

### RULINGS

1. On July 10, 2007, after the ALJ issued the Recommended Order, Appellant filed a "Petition for Reconsideration for Rehearing." It asked this Board to reopen the record to receive evidence that was unavailable at the time of the hearing. We conclude the proffered evidence is irrelevant and therefore deny the petition.

Appellant challenges his layoff which occurred when a more senior employee bumped into Appellant's position during a reduction in staff. Under the applicable policy, a more senior employee can bump into a position for which the employee is qualified or can become qualified within 30 days. Appellant asks to reopen the record to present evidence that the employee who bumped into Appellant's position was unable to do the job and was removed from it nine months later.<sup>1</sup>

We conclude that the proffered evidence is irrelevant. The reasonableness of the State's determination that the employee was or could become qualified for the job must be judged on the circumstances at the time of the decision, not in retrospect. Even if the State was ultimately wrong in determining that the employee could become qualified to do the job within 30 days, that does not tend to prove the determination was unlawful or unreasonable at the time it was made.

2. On September 12, 2007, after oral argument on Appellant's objections to the Recommended Order, Appellant requested permission to clarify his objections and to file additional objections. We deny the request.

A party has 14 days from the service of the Recommended Order to file objections. OAR 115-045-0040(2). This Board has discretion to extend the time for objecting if good cause is shown. OAR 115-010-0090. The Recommended Order was served on June 26, 2007. Appellant filed timely objections, the State filed a brief in

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<sup>1</sup>In response to Appellant's petition, the State submitted substantial documentation that the employee who bumped into Appellant's job left that job not because he was removed as unqualified, but because he applied for and was hired into another position. Because of our resolution of the petition, we need not resolve the factual dispute about why the employee left the job. Even if we assume for purposes of this petition that Appellant could prove what he asserts, the evidence is irrelevant to the issue in the case.

response to the objections, and this Board conducted oral argument on the objections. Appellant now seeks to clarify and expand his objections on the grounds that the State asserted in its brief and at oral argument that Appellant's objections were not sufficiently specific. At oral argument, Appellant had the opportunity to clarify his position on the objections he filed. Additional objections at this late date would be untimely, and Appellant has not shown good cause for an extension of time. We therefore deny Appellant's request for leave to clarify his objections and to file new objections.

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

#### FINDINGS OF FACT

1. DAS is an agency of the State of Oregon (State).
2. On August 21, 2000, DAS hired Hays to work in a position in the classified service as an Information Systems Specialist (ISS) in its Enterprise Applications Division.
3. The ISS classification series has eight levels; each level involves increasingly more complex work assignments. Employees assigned to ISS level 8 provide expert consultation to DAS customers, and exercise leadership in analyzing, planning, developing, implementing, and coordinating the operations, maintenance, installation, and construction of information systems. On the date of his layoff, Hays was employed as an ISS 8.
4. Effective October 1, 2004, DAS began using DAS Statewide Policy 50.025.01, "Model Classified Unrepresented Layoff Plan," when it was necessary to lay off employees. Under Section (2)(a) of this policy, DAS designates particular positions, classifications, organizational units, or geographical areas for layoff. DAS then calculates a service credit score for each employee in the group identified for layoff. The service credit score is computed by crediting an employee with one point for each full month of service as a permanent State employee; additional points are added to the employee's score for favorable performance evaluations and points are subtracted for unfavorable evaluations.

Once service credit scores have been computed for all the employees in the group identified for layoff, DAS implements the following procedure under Statewide Policy 50.025.01(2):

- “(f) The employee(s) with the lowest service credit score shall receive the first layoff notice(s) by classification, within the areas identified in Section (2)(a) of this policy, in the following separate categories:
  - “(A) Permanent full-time positions;
  - “(B) Permanent part-time positions;
  - “(C) Seasonal full or part-time positions.
  
- “(g) The appointing authority shall, at least 15 days prior to the effective date of layoff, provide written notification to the identified employees of pending layoff, date of layoff, the employee’s service credit score, layoff rights and options, and assist them in making their transition.
  
- “(h) Upon receipt of the written notice, the employee shall select one of the following options and communicate such choice in writing to the agency personnel manager within five (5) working days from receipt of the layoff notice:
  - “(A) Within the area identified in Section (2)(a) of this policy, an employee may displace another employee with a lower service credit score in the same classification for which he/she meets any special qualifications for the position. Displacement shall begin with the lowest service credit score in the same classification. Vacant positions that the agency intends to fill are considered to have ‘0’ seniority and must be used prior to displacement consistent with the provisions of Section (i) below.
  
  - “(B) Within the area identified in Section (2)(a) of this policy, an employee may displace another employee with a lower service credit score in any lower classification for which he/she meets

any special qualifications. Displacement shall begin with the lowest service credit score in the lower classification. Vacant positions that the agency intends to fill are considered to have '0' seniority and must be used prior to displacement consistent with the provisions of Section (i) below.

“(C) The employee may elect to be laid off

“(i) To qualify for the options under (h)(A) and (B) above, the employee must be capable of performing the specific requirements of the position within a reasonable period of time. A reasonable period of time is defined as approximately 30 days.

“(j) Failure on the part of the employee to respond within 5 working days shall be considered as acceptance of option (h)(C) - layoff.”

5. In practice, DAS Personnel Department representatives implement two rounds of position bumping when a layoff is necessary. The first round occurs when employees selected for layoff exercise their bumping rights under the provisions of DAS Statewide Policy 50.025.01(2)(h). The second round occurs when the employees who have been bumped from their jobs by first round employees exercise *their* bumping rights.

Before issuing the formal notice required by Section (2)(g) of the layoff policy, a DAS Personnel Department representative meets with each employee selected for layoff and each employee who will be bumped by another employee. At this meeting, the employee reviews the position description for the job with the lowest service credit score in the same (or lower) classification as the job held by the employee selected for layoff. If the employee decides that he or she is qualified to fill the position, the employee then meets with the supervisor for the position. If the supervisor agrees that the employee is qualified for the position, the employee is placed in this job.

If the employee decides that he or she does not meet the minimum qualifications for the position, the employee must provide the Personnel Department with reasons for rejecting the position. The employee then considers the position description for the job with the second lowest service credit score in the same (or lower) classification as the job held by the employee selected for layoff, and decides whether he

or she is qualified for this position. The process continues until the employee is placed in a position, or a determination is made that the employee does not qualify for any available positions.

An employee must consider one position at a time and will be allowed to consider a position in the employee's current classification (or a lower classification) with a higher service credit score only after a position with a lower service score has been rejected.

The DAS Personnel Department sends an employee the formal layoff notice required by Section (2)(g) of the layoff policy after the employee has accepted a position into which the employee wishes to bump, has found no position into which the employee wishes to bump, or has chosen to be laid off.

6. On January 28, 2005, DAS announced that an employee in the Information and Resources Management Division (IRMD) would be laid off. The employee who was selected for layoff chose to bump into another position; the employee who was displaced by this action then elected to bump into the position held by Hays. The various job changes were postponed, however, because the person who was selected for layoff was on medical leave.

Hays met with a representative from the DAS Personnel Department to discuss his options under the layoff policy on March 23, 2005. The representative reviewed the provisions of DAS Statewide Policy 50.025.01 and explained to Hays that his salary would not be reduced if he accepted a position in a lower classification during the layoff process.

The planned layoff never occurred because the employee originally chosen for layoff died. Consequently, neither Hays nor any other employee was bumped from a position.

7. In 2006, the General Government Data Center (GGDC) within the Information Resource Center at DAS was eliminated, requiring a reduction in staff. Employees whose positions were cut as a result of this change were given an opportunity to apply for positions at a newly-created State Data Center. Fifteen employees in the GGDC were not offered jobs at the State Data Center and were scheduled to be laid off by DAS; one of these employees was Randy Fleshman. In 2006, Fleshman was employed as an ISS 8.

8. In preparation for the 2006 layoff, Debbie West, a human resources analyst in the DAS Personnel Department, calculated service credits for unrepresented employees in ISS positions at levels 5 through 8. The list was then given to employees so that they could make any necessary corrections. Fleshman began working for the State on April 1, 1976, and had the highest service credit score on this list.

9. On July 24, 2006, West met with Fleshman and other employees affected by the layoff to explain their rights under DAS' layoff policy.

10. On July 25 and July 27, 2006, West met individually with Fleshman. In accordance with the DAS layoff policy and practice, West and Fleshman reviewed position descriptions for a number of ISS 8 positions filled by individuals with lower service credit scores than Fleshman. Fleshman lacked knowledge of and experience with the CIMS application and BRIO server, requirements for one position (number 051002). Fleshman did not have sufficient knowledge of state government security practices to qualify for four positions (numbers 0414886, 0414887, 014888, and 0044870). Although Fleshman had some experience working with the UNIX system, he did not have enough background in UNIX to qualify for work as a UNIX administrator, the major duty for two positions (numbers 0414890 and 048131). The description for two positions (numbers 0044868 and 004867) specified that 45 percent of the job involved project management work; Fleshman had little experience as a project manager. Because of his significant lack of experience in the duties of these jobs, Fleshman did not believe that he would be capable of meeting the requirements for any of these positions within 30 days.

Fleshman concluded that he had the qualifications and experience for the position filled by Hays (position number 0231024) because he could learn to perform the duties of the position within 30 days. Hays' position required current experience with "COBOL batch and online program with DB2" and "SFMA Accounting System or other large accounting system, Payroll or Personnel system," and proficiency in "the online INTERTEST and batch XPEDITER/TSO debugging tool."

Fleshman gained experience with the SFMA accounting system, the COBOL system, and a version of the XPEDITER debugging tool when he worked in the State Department of Revenue from 1978 through 1980. Fleshman also attended meetings regarding plans to bring the SFMA accounting system to DAS in 1994 and 1995. Fleshman believed that he could learn the current versions of these systems and the debugging tool within 30 days if he accepted the position held by Hays.

11. Fleshman met with Kim Chi Tran, Hays' supervisor. She agreed with Fleshman that he could learn the duties of Hays' position within 30 days. Tran's opinion of Fleshman's capabilities was based on her past experience working with him; she found him to be both knowledgeable and helpful. Fleshman notified West that he had decided to bump into Hays' position.

12. By letter dated August 1, 2006, DAS Acting Personnel Manager Marilyn Nixon notified Fleshman that he would be laid off from his current position on August 25, 2006. In her letter, Nixon outlined Fleshman's three options: displacing an employee with a lower service credit score in the same classification; displacing an employee with a lower service credit score in a lower classification; or electing to be laid off. The letter also identified Appellant's position (number 0231034) as the job into which Fleshman had chosen to bump.

13. On August 7, 2006, Fleshman notified Nixon that he had elected to bump into Hays' position (number 0231024).

14. Tran told Hays that Fleshman had chosen to bump into his position.

15. On August 8, 2006, Hays met with West to discuss his options under the DAS layoff policy. West began the meeting by showing Hays the position description for a vacant ISS 8 position (number 0414887). When Hays objected to considering this position before looking at any others, West then showed Hays descriptions for two other jobs filled by employees with lower service credit scores than Hays. Hays told West that he was not interested in one of these positions, an ISS 8 position (number 0614881), because it required work in the human resources department and he did not want to work there. In regard to the other position, an ISS 7 position (number 0414094), Hays explained that he was reluctant to displace an employee by bumping into this job, but would accept this position as a last resort.

Hays told West that he believed that he was qualified to fill and was interested in the vacant ISS 8 position (number 0414887), and agreed to talk with the appropriate supervisor.

16. After meeting with West, Hays decided that he did not have appropriate experience for the vacant ISS 8 position (number 0414887). The position required six years of application security experience, which Hays did not have. On August 10, 2006, Hays told West that he believed the job description for the vacant ISS 8 position was not a "good match for my skills, interest, and experience." West responded by asking Hays to provide her with reasons why the vacant ISS 8 position was

not appropriate for him and also asked Hays if he was interested in the ISS 7 position (number 041494). Hays never responded to West.

17. By letter dated August 10, 2006, West notified Hays that he would be laid off because another employee had chosen to bump into his position. West listed Hays' three options under the DAS layoff policy: displacing an employee with a lower service credit score in the same classification as Hays; displacing an employee with a lower service credit score in a classification lower than the one in which Hays was placed; or electing lay off. West noted that Hays had not identified a position in his current salary range or a lower salary range that he was qualified to fill. West told Hays that if he did not choose one of the three options offered by August 16, 2006, DAS would conclude that he had chosen to be laid off.

18. Hays believed that Fleshman was not qualified to fill his position, and also believed, incorrectly, that he would suffer a reduction in salary if he accepted the ISS 7 position (number 041494) that he had discussed with West. If Hays had chosen to bump into the ISS 7 position, however, he would have been placed at a step on the appropriate salary schedule that would have given him a salary equal to the one he received in his former ISS 8 position.

Hays wanted to obtain legal advice before responding to West's August 10 letter, but was unable to do so by August 16. Consequently, Hays never answered West's letter.

19. By letter dated August 17, 2006, Nixon notified Hays that DAS considered that he had chosen to be laid off because he never responded to West's August 10 letter. Nixon told Hays that his layoff would be effective August 25, 2006.

20. On August 28, 2006, Fleshman began working in the position formerly held by Hays. Tran placed Fleshman on a work plan during his first month on the job and evaluated his progress on the work plan each week. Fleshman successfully completed the work plan.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. DAS did not lay off Hays in violation of ORS 240.086(1)

## DISCUSSION

ORS 240.086(1) empowers this Board to review any personnel action affecting a classified State employee “that is alleged to be arbitrary or contrary to law or rule, or taken for political reason, and set aside such action” if this Board finds the allegations to be true. Appellant Hays alleges that DAS’ decision to lay him off should be set aside because it was arbitrary and violated state policy.<sup>2</sup>

There is little disagreement between the parties that DAS complied with most of the requirements of DAS Statewide Layoff Policy 50.025.01 when it determined the positions that would be affected by the layoff, computed service credit scores for employees impacted by the layoff, and notified employees of their rights and responsibilities during the layoff process. They also agree that Fleshman was scheduled to be laid off and that he had a higher service credit score than Hays. Hays contends, however, that DAS violated its layoff policy by allowing Fleshman to bump Hays from his position because, according to Hays, Fleshman was not qualified for the job. Hays relies on DAS Statewide Layoff Policy 50.025.01, sections 2(h)(A) and 2(i) which permit an employee selected for layoff to displace another employee with a lower service credit in the same classification if the employee meets any special qualifications for the position. The policy considers an employee to be qualified for a job if the employee is capable of performing the requirements of the position within a “reasonable period” of approximately 30 days. Statewide Policy 50.025.01(2)(i).

The layoff policy does not specify a method for determining whether an employee selected for layoff is capable of performing the requirements of the job or can become capable in approximately 30 days. In practice, however, DAS has permitted the employee and the supervisor of the position the employee seeks to fill to decide. Here, DAS acted consistently with its prior interpretation and application of the layoff policy: Fleshman reviewed the descriptions for the positions he was eligible to fill, based on his service credit rating, and determined that he was capable of performing Hays’ job within 30 days. Tran, Hays’ supervisor, agreed with Fleshman. Tran was particularly well qualified to make this determination. She supervised Hays and was therefore familiar

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<sup>2</sup>ORS 240.086(1) authorizes us to review an alleged violation of a “rule.” The parties do not raise, and we therefore do not decide, whether a statewide policy constitutes a “rule” under the statute, or whether instead the statute applies only to a violation of an administrative rule adopted under the Administrative Procedures Act, ORS chapter 183. For purposes of this case, we assume, without deciding, that the statute applies to a violation of statewide policy. Even if a policy does not constitute a “rule” for purposes of our review, a failure to follow and uniformly apply a policy could be an “arbitrary” action under the statute.

with the job requirements; and she had previously worked with Fleshman and was therefore familiar with his skills and abilities.

When an issue is not directly addressed in the Statewide Layoff Policy, the agency may interpret and flesh out the policy in a reasonable fashion. In *Gould v. Children's Services Division and Executive Department*, Case No. 1160 (May 1981), *order on reconsider* (December 1981), this Board considered Executive Department layoff rules which used employees' performance appraisals to compute service credit score. These service credit scores were then used to determine the order of layoff. Before implementing a layoff, the Executive Department issued a directive that performance appraisals completed after July 1, 1980 would not be used in computing employees' service credit scores. We noted that the layoff policy was silent on the question of a cutoff date for performance appraisals, and agreed that specifying a cutoff date was "no more than a permissible fleshing out or interpretation" of the relevant rule. *Gould on reconsider* at 9. We found that the Department had a reasonable basis for establishing the July 1, 1980 cutoff date: it wanted to avoid any possibility that performance appraisals would be improperly influenced once it was known that layoffs were imminent. For this reason, we concluded that the Department's retroactive imposition of the July 1, 1980 cutoff date for consideration of performance appraisals was not arbitrary. *Gould on reconsider* at 9-10.

In this case, as in *Gould*, the relevant rule does not speak to some of the details of its application. The DAS Statewide Layoff policy is silent on the method to determine an employee's qualifications for a position that an employee selected for layoff seeks to fill. The procedure used by DAS—allowing the affected employee and the supervisor to decide if the employee can become capable of performing the position duties within 30 days—is a reasonable interpretation of the DAS layoff policy. An employee who will fill a job and the person who will supervise the employee's work can rationally be expected to make a realistic assessment of the employee's abilities.

Nor do we find that DAS arbitrarily applied its Statewide Layoff Policy in choosing to put Fleshman in Hays' position. An action is arbitrary if it "is taken without cause, unsupported by substantial evidence, or nonrational." *Paul v. Personnel Div.*, 28 Or App 603, 608, 560 P2d 293 (1977). Substantial evidence is more than a mere scintilla and is also defined as the type of evidence a reasonable mind might accept as adequate to support a conclusion. *Rodriguez, et al. v. Secretary of State, Division of Audits*, Case Nos. MA-24/25/34-94 at 15 (September 1995). Here, DAS reasonably accepted the opinions of Fleshman and Hays' supervisor and concluded that Fleshman was able to fill Hays' position. In turn, Fleshman's assessment of his qualifications was based on a review of the requirements of the job; as a person with substantial experience working

for the State, he had the background to make an informed evaluation of his abilities. Tran based her judgment both on her past experience working with Fleshman and an interview with him. Consequently, the record establishes that DAS' decision that Fleshman was qualified to perform Hays' job was supported by substantial evidence and was not arbitrary.

Hays also asserts that Fleshman gave inconsistent statements about his ability to perform or quickly learn certain tasks that were crucial to Hays' position. Fleshman turned down other positions occupied by employees with lower service credit scores than Hays. According to Hays, Fleshman justified rejecting some of those jobs on grounds that he lacked the required skills in "DB2" and the required experience in project management, but nevertheless said he was qualified for Hays' position even though it also required "DB2" skills and project management experience. We find no inconsistency. Fleshman did not reject any position because he lacked "DB2" skills. (See Finding of Fact 10, to which Appellant did not object, and Exhibit R-6.) Hays' position required "COBOL batch and online program with DB2." Fleshman became familiar with the COBOL system in one of his prior positions with the state, and DAS reasonably determined he was, or could quickly become, capable of performing this duty.

Next, Hays correctly observes that Fleshman turned down two other positions because he lacked significant project management experience. Both of those positions specified that 45 percent of the job involved project management. The job description for Hays' position mentions project management in the introduction, but it does not include project management in the body of the description where each job duty is listed along with the percentage of the job it occupies. In addition, the resumé Hays drafted does not mention project management in his description of the position. We find no inconsistency with Fleshman rejecting a position that requires 45 percent project management and accepting this position.

Last, Hays asserts that DAS arbitrarily applied its policies when it required him to provide written documentation of the positions he turned down, but did not require Fleshman to provide the same type of documentation. The applicable policy requires only that an employee provide the Personnel Department with the reasons for rejecting a position. Fleshman met with an analyst in the Personnel Division and provided her with the reasons he believed he was not qualified for the positions occupied by employees with lower service credit scores than Hays. The same Personnel Department analyst met with Hays to review the positions available to him. Hays initially agreed that he was qualified for an available position at the same classification and level as his current position. After this meeting, however, Hays reconsidered and sent an e-mail stating that the job "would not be appropriate" for him. The analyst asked Hays to

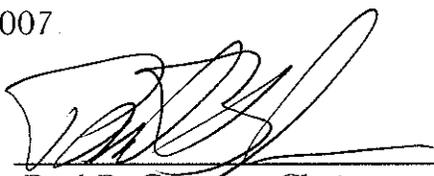
provide his reasons for rejecting the position. There was no analogous situation where Fleshman initially agreed to a position but later changed his mind, so there was no disparate treatment. In these circumstances, the analyst's request for Hays' reasons was neither arbitrary nor contrary to rule.

Hays has failed to carry his burden of proving that DAS acted arbitrarily or contrary to rule or law. We will therefore dismiss his appeal.<sup>3</sup>

ORDER

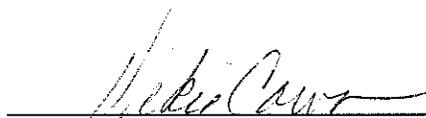
The appeal is dismissed.

DATED this 27<sup>th</sup> day of December 2007.



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Paul B. Gamson, Chair



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Vickie Cowan, Board Member

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\*Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Board Member Rossiter has recused herself.

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<sup>3</sup>We note that even if Hays were correct in asserting that he was improperly laid off, we would not award him any monetary damages. Hays was legally obligated to attempt to mitigate his damages by obtaining other work. Here, the State offered Hays several suitable positions that would have provided the same income as the position from which he was laid off. This potential income would offset any financial losses Hays may have incurred when he was laid off.