

On December 5, 2002, Debra Fery filed this appeal, alleging that the State of Oregon (State) through its Department of Administrative Services (DAS), Information Resources Management Division (IRMD), and General Government Data Center (GGDC), violated ORS 240.570 by terminating her employment.¹ Fery alleged that the State terminated her in bad faith, and her termination was not as a result of a legitimate reorganization or for lack of work.

The issue is: Was Fery removed from management service because of a legitimate reorganization or lack of work within the meaning of ORS 240.570(2)?²

The ALJ found that Fery failed to prove that she was terminated by the State for disciplinary reasons and not a reorganization. For the reasons discussed below, we conclude that Fery's termination from employment was for disciplinary reasons.

In a disciplinary dismissal, the burden of proof is on the employer to show that the employee was terminated in good faith for cause. While admitting that Fery was already under disciplinary review when functional changes were being imposed in the unit that she supervised, the State argued that Fery's termination, four months after the GGDC reorganization, was part of a legitimate reorganization. We do not agree. We conclude that Fery was terminated for reasons other than those provided for in ORS 240.570(2).

RULINGS

At hearing, the State objected to the introduction of evidence unrelated to GGDC and IRMD reorganization and budget issues. Fery sought to introduce evidence of her conflicts with IRMD and GGDC managers and related material. The ALJ properly overruled the State's objection because Fery's conflicts with her managers are relevant to her claim that discipline because of conflicts with those managers, not a reorganization, is the reason she was terminated.

Prior to hearing, Fery sought to subpoena DAS/IRMD State Chief Information Officer John Lattimer, who supervised DAS/IRMD Deputy State Chief Information Officer

¹Respondent employer is the "State" unless referring more specifically to the state agency (DAS) or an agency work unit or division (GGDC and IRMD)

²Representing herself in this complaint, Fery claimed that her removal was disciplinary and not as the result of a legitimate reorganization. If we find that her termination was not the result of a legitimate reorganization, we will not determine whether the State had cause under ORS 240.570(3) or (5) for the termination. The State made no argument or attempt to prove that Fery was terminated for disciplinary reasons and in good faith for cause.

Mike Freese. Freese supervised GGDC Manager Pete Schoelzel. Fery sought to call Lattimer to testify regarding the amount of money available in the IRMD budget. The State objected to issuance of a subpoena on the grounds that Lattimer's relationship with the case was attenuated, and that an agency head should not be required to testify, absent a showing of significant need for that testimony. The ALJ denied Fery's request, ruling that she had alleged that other individuals had taken the active steps to end her employment, that any evidence from Lattimer would be cumulative, and that much, if not most, of that testimony would not be based on Lattimer's personal knowledge. The ALJ's ruling was within his discretion.³

Prior to hearing, Fery sought copies of the personnel file of Phyllis Michael and others. The State objected. Fery renewed the motion at hearing. The ALJ properly denied the requests as seeking evidence which was irrelevant to the issues before him. Fery also sought IRMD budget material created after her separation from employment and notes of meetings which took place after her separation from employment. The State objected to the requests. The ALJ acted appropriately within his discretion in denying these requests.

In an attempt to shorten a lengthy hearing process, reduce the number of witnesses called, deal with objections prior to the continuation of the hearing, and focus the pro se appellant on the issues in the case, the ALJ required the parties to exchange lists of additional exhibits and remaining witnesses, and a brief description of the expected testimony of each witness. Under the circumstances, the ALJ acted within his discretion in making these rulings.

At hearing, Fery sought to present evidence that the State had violated the Oregon and Federal Family Medical Leave Acts and Oregon statutes regarding violence in the workplace. The State objected to presentation of this evidence. The ALJ properly ruled that this Board does not have jurisdiction over these claims.

At hearing, Fery filed a "Motion for Mis-hearing" on the grounds that counsel for the State and management officials had contacted some of the individuals on Fery's witness list and discussed her case without her knowledge, consent, or presence. Fery

³At hearing, Fery renewed her motion. The record shows that Fery met with Lattimer and Debbie Bryant, a member of Lattimer's staff, on at least three occasions. Those meetings were recorded in notes taken by Bryant, which were admitted into evidence. Fery did not call Bryant as a witness. The ALJ adhered to his rulings regarding Lattimer, noting, in addition, that Bryant was not called as a witness, neither Fery nor GGDC challenged the authenticity or accuracy of Bryant's notes, and the thrust of Fery's contentions regarding Lattimer's conduct was simply that he had participated in the IRMD budget process and had done little in response to her complaints. We affirm the ALJ's ruling.

presented no evidence or authority that representatives of the State acted improperly in contacting these individuals. The ALJ properly denied the motion.

Near the end of the hearing, Fery offered Exhibit A-85, which she represented was a photocopy of handwritten notes supplied to her by the Oregon Department of Education (DOE). The notes purportedly reflected a conversation between a DOE official and a GGDC official regarding Fery's application for a position with the DOE after her separation from GGDC. The State disagreed with Fery about the identities of the individuals involved in the conversation and objected to the introduction of the document as not properly authenticated. The ALJ deferred ruling on the motion until issuing his recommended order. In his recommended order, the ALJ properly ruled that the document would not be received into evidence because (1) Fery had no actual evidence of the identities of the parties to the call, and (2) the document appeared to have been written with two different pens.⁴

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

FINDINGS OF FACT

1. Fery began work with GGDC on July 19, 1999, as the GGDC Operations manager, a position in management service. Although she had previously worked in management service in the area of computer information services for the State, she had never held a classified position in Oregon state government.

2. GGDC is a subdivision of IRMD, itself a division of DAS. GGDC performs sophisticated computer services such as designing computer hardware and software systems, backing up data, and hosting worldwide web pages for other state entities. GGDC is funded by billing the state entities it serves for the services it performs. It employs between 40 and 50 people. IRMD, together with the DAS Publishing and Distribution unit (P & D), with which it was merging during 2002, employed approximately 320 full-time employees.

3. At the time she was hired, Fery directly supervised four positions and indirectly supervised 14 additional positions. In July 2000, Fery supervised, directly or indirectly, 32 positions. By May 2002, Fery was directly supervising three positions, one of which was vacant, and indirectly supervising 14 additional positions.

⁴The document is not necessary, as this record provides ample evidence that Fery had fallen out of favor with her employer and this led to her discharge. We exclude it from this record for the reasons drafted by the ALJ, but also note that it is certainly likely Fery did not receive positive recommendations from supervisors who were responsible for her discipline and discharge.

4. The tasks performed by the Operations unit were: operating the "help desk," which responded to questions from GGDC customers; running a complex billing process; staffing the Burns, Oregon, data backup center; and performing miscellaneous functions such as maintaining an internal backup tape library.

5. Three GGDC staff located in Burns, Oregon, operated and maintained a backup computer data storage facility for state entities. GGDC billed state entities for their use of the Burns backup service. Fery's subordinate, Scot Connor, directly supervised the Burns unit.

6. In the spring of 2000, GGDC reduced the rate it charged for the use of its "Datamart" services from \$2.17 to \$.763 per CPU minute because (1) GGDC computer problems had plagued customers, and (2) GGDC costs to provide the services had decreased. Fery had helped evaluate the Datamart rate and had recommended reducing it.

7. Fery received performance evaluations for the period August 26, 1999 to January 25, 2000. She was rated as exceeding expectations.⁵ In January 2000, Fery's supervisor recommended that she be given 40 hours of exceptional performance recognition leave with pay. In early 2002, Fery requested GGDC managers prepare her next scheduled performance evaluation, but that evaluation was never done.

MANAGEMENT CHANGES

8. Fery's immediate supervisor was the GGDC manager. The GGDC manager reported to the DAS/IRMD deputy state chief information officer, who supervised other IRMD divisions as well. That official reported to DAS/IRMD State Chief Information Officer Lattimer. Lattimer reported to DAS Director of Operations Colleen Sealock.

9. Freese was promoted to DAS/IRMD deputy state chief information officer under Lattimer sometime before December 2001. Freese had previously been in a position outside GGDC. In an all-IRMD staff meeting that took place after Freese's appointment, Fery asked Freese several pointed questions that may have been more prudently asked in private. Freese appeared pained by the questions.⁶

⁵Fery's performance evaluations for work in prior state manager positions also indicated that she exceeded expectations in her managerial skills and was considered a valuable member of the management team.

⁶Jim Godfrey testified that he believes Fery lost favor with Freese in this meeting and never regained it.

10. After his appointment and prior to December 2001, Freese told Fery he disagreed with Fery's rating of certain employees at the highest level of approval in the employees' performance evaluations.

11. On January 4, 2002, Freese granted permission for Fery and Michael to attend a management seminar program, and to have GGDC pay for the tuition cost of \$3,000.

12. During the 2001-2003 biennium, GGDC suffered a significant financial shortfall. On January 21, 2002, a holiday, Fery met with other GGDC and IRMD managers to discuss the issue. They concluded that GGDC did not charge enough to cover the costs of the services it provided. Fery and other GGDC staff recommended an increase in the rates GGDC charged its customers to avert the crisis. DAS later rejected the rate increase.

13. DAS officials had planned that IRMD merge with the 140-employee P & D unit. In January 2002, Freese selected Fery to represent GGDC on the P & D merger team.

HIRING OF GGDC MANAGER SCHOELZEL

14. By February 2002, the position of GGDC manager, formerly held by Marc Williams, had been vacant for some time. In February, Fery asked Freese to give her work-out-of-class status, a new position description, and ultimately a reclassification of her position resulting in a higher salary because of higher-level work she was performing due to the Williams vacancy.

15. In March and April 2002, IRMD and GGDC engaged in an open hiring process for the GGDC manager position, which reported to Freese. Several GGDC and DAS managers encouraged Fery to apply for that position, which she did.⁷ Fery was rejected by Freese in the first round.

16. In March, Fery was asked to participate in a meeting with Schoelzel, a second-round candidate for the GGDC manager. Fery was unhappy with the State's failure to select her for the position, and was unhappy with participating in what she perceived as a second round of interviews. Freese ended the meeting because he believed that Fery's questions were inappropriate. However, Schoelzel later told Fery that he did not think her questions were inappropriate.

⁷Given Fery's experience, prior performance evaluations, current higher-level work assignments, education, and training, she seemed by some to be a likely internal candidate for this position.

17. In March, Fery requested that Freese review the hiring process. She confirmed the conversation in a March 11 e-mail, stating, "I will schedule a meeting with you within 30 days to discuss the my [*sic*] disappointment in not getting the GGDC managers [*sic*] job and reason for not getting it." That same day, Freese told Fery that she had been rejected because the hiring decision makers wanted a manager with greater experience in managing data centers. Fery accused Freese of gender bias.

18. On March 21, Freese told Fery that the real reason Fery was not promoted was because she did not have sufficient managerial skills.⁸ Freese told Fery that he withheld this information on March 11 because Fery had appeared "teary eyed" at the time. Fery believed this comment was sexist.

19. On March 26, 2002, Freese reprimanded⁹ Fery for (1) her angry, loud, and inappropriate response to being denied the GGDC manager position, and (2) for her comments during the meeting with applicant Schoelzel.

SCHOELZEL AND FERY WORK RELATIONSHIP

20. Schoelzel was hired as the GGDC manager and began work in April 2002. He had studied organization models for computer service entities such as GGDC, and he had 22 years of military experience. After he was hired, Schoelzel wrote Freese an undated memo listing what he understood to be his initial assignments for May 2002. Amongst other things, Schoelzel's list included "look at and present possible IRMD Organizational Structure for E-Gov" and "look at the Functional structure for GGDC and make appropriate changes if necessary." According to Schoelzel's memo he had a 90-day deadline to complete most of the list unless a September due date was directed.

21. In April when Schoelzel was hired, GGDC was comprised of three units with 41 employees: (1) the largest was the Operations unit of 17 employees, headed by Fery and described above; (2) the Technical Services unit, or Mainframe unit, of 10 employees headed by Linda Roberts (composed mostly of software analysts and systems analysts who worked on matters related to mainframe computers); and (3) the Enterprise IT Services unit, or Open Systems unit, of 14 employees headed by Michael (generally composed of technical

⁸Freese either did not know about Fery's previous performance evaluations, which indicated significant managerial skills, or he felt she did not have the management skills he preferred.

⁹The text of this reprimand, if written, does not appear in the record.

people such as database administrators and software analysts, working on issues related to desktop computers and their networking).¹⁰

22. On April 30, Freese assigned Schoelzel to serve on the P & D merger committee and directed Schoelzel to inform Fery that she was being removed from the committee. Schoelzel informed Fery of the removal in front of two other managers, and stated that the reason for the removal was Fery's failure to attend committee meetings. Fery later told Schoelzel privately that her removal, and the way it was announced, was humiliating and a "slap in the face."

23. On May 22, Fery was scheduled to give a presentation to the IRMD managers meeting. The topic was one with which she was very familiar, and she had spoken at conferences on related matters. The manager who spoke before Fery took over half an hour. Before she rose to speak, Schoelzel instructed her to limit her comments to five minutes, pursuant to an agreement between the managers. Fery took substantially longer than five minutes to give the presentation. Other managers complimented Fery on her presentation. Schoelzel praised Fery, but also mentioned that she had far exceeded the five-minute length he had directed.

24. In June 2002, as part of the IRMD and GGDC budget process, Freese sent the DAS Office of Business Administration an initial finance package regarding a variety of GGDC and IRMD positions.¹¹ Some positions were reclassified to a lower level, some were abolished, and some were created. The package, if approved, would have authorized GGDC to spend more than had been allocated to it. The package did not request elimination or reclassification of Fery's position. Although cautioning for a possible deficit in 2003-05, a DAS Budget Status Report from June 30, 2002, indicates that IRMD was expected to end the biennium with a cash reserve balance of \$5.2 million dollars.

¹⁰Although Shoelzel moved some positions around, plans for a formal reorganization were not discussed in any coordinated manner with Fery and her staff. Perhaps Schoelzel understood a functional structure change to be different than a reorganization. However, after some staff reassignments by Schoelzel and a cubicle shuffling at the end of July, a new organizational chart was eventually issued on August 5, 2002, which placed approximately 50 FTE positions in the GGDC staff under Schoelzel. Although some positions were held vacant, there is little evidence in this record of the dollars actually saved by changing the functional structure of GGDC

¹¹This reclassification request was not characterized as part of a reorganization but rather the DAS IRMD Financing Plan. The reclassification process begins with a request by the managers who supervise the affected positions. The evaluation and approval of a proposed reclassification is made by the DAS Human Resource Services Division (HRSD).

25. On June 15, Schoelzel verbally reprimanded¹² Fery for (1) doing work of the LAN/Desktop group without authorization, and (2) going behind Schoelzel's back in discussions with other staff.

26. On June 19, after individual discussions with several GGDC staff and managers, Schoelzel announced that he was reducing the GGDC Burns office statewide backup data storage rate from \$32.00 to \$16.00 per gigabyte transferred. Fery was out of the office when the discussions on the issues involving the unit she supervised took place.

27. On June 19, Fery and Schoelzel met to discuss a computer inventory project that Schoelzel had assigned her. Schoelzel had intended that Fery simply list the number and type (processor and hard drive size) of computers in the office, and have the DAS Office of Information Technology (DOIT) do the same, to make sure the count was accurate.

28. Fery could not understand why Schoelzel would want two lists to compare, and construed Schoelzel's assignment as a request to inventory the computers and all of the software on each computer, a more cumbersome task that Fery believed would result in a comprehensive and useful resource.

29. Fery discussed the matter with DOIT staff. They agreed that DOIT staff would count the equipment and Fery, with the assistance of a GGDC staff person, would inventory the software. Fery had e-mailed a brief summary of her plans to Schoelzel and Michael. Schoelzel did not respond, but Michael replied, "Good work Debbie!!"

30. On June 19, when Schoelzel and Fery met, Schoelzel expressed his displeasure at the elaborate project Fery had completed instead of the simple project he requested. Fery perceived Schoelzel to be furious.

31. On the morning of June 21, Fery met with Debbie West, assistant to Jerry Korson, DAS personnel manager, about Fery's June 19 meeting with Schoelzel. Fery told West that Schoelzel had yelled at her for 45 minutes, had pounded on the table, and that Fery had been afraid Schoelzel would strike her.

32. On the afternoon of June 21, Fery met with Schoelzel. Schoelzel had requested a private meeting with Fery, but she had told him that she did not want to meet with him alone again. Fery and Schoelzel met in the back of the machine room, a place Fery described as "private, but not isolated." The two reviewed Fery's list of ongoing projects.

¹²Written documentation of this reprimand does not appear in the record

Schoelzel told Fery that her inventory had been "overkill." The tone of the meeting was professional.

TRANSFERS OF BURNS STAFF, BECKY MCCARROLL, AND RHONDA CHARLES OUT OF THE OPERATIONS UNIT

33. On June 25 and 26, 2002, Fery attended a conference in San Francisco, where she gave a presentation. While Fery was gone, Schoelzel announced that he had decided to remove the Burns staff from Fery's Operations unit and place them in the Open Systems unit, under Michael and her subordinate Deanne Dyer. At hearing, Fery's subordinate Connor, who had been the direct supervisor of the Burns staff, acknowledged that Dyer was a logical supervisor for the Burns staff.

34. Also in June, Schoelzel moved McCarroll's position from the "help desk" in Fery's Operations unit to the Mainframe unit under Roberts.

35. On July 1, Fery told Schoelzel that she wanted a "new home on the team." She had many, varied tasks, including preparing "Service Level Agreements" (SLAs), supervising the GGDC help desk, and being the only manager with overall knowledge and oversight over the complicated GGDC business and billing process. Fery said that she was spending all of her work time "putting out fires."

36. On July 1, Fery also asked that the issue of the removal of employees from her unit be added to the agenda for a GGDC managers meeting that afternoon. During the meeting, Fery asked "how the decision of the transfer of management for Burns came about." Schoelzel responded that he had spoken one-on-one with staff about the issue while Fery was away from the office. Fery also asked about "the direction of her manager position and Scots [*sic*] supervisor position. What is the direction?" Schoelzel responded "I don't have an answer yet." Schoelzel testified that Fery had been present for numerous conversations among GGDC managers on the general subject of planned changes in GGDC's structure. We find, however, that many of the specific planned changes, and their impact on Fery's position, were never disclosed to Fery until, or after, the changes were already implemented.

37. Fery had also requested that a confidential personnel matter be placed on the agenda for the July 1 meeting. Fery planned to raise questions about the work relationship between Charlene Wood and a member of Fery's team. Wood was a classified employee who normally took notes at GGDC management meetings. During the July 1 meeting, Fery asked to raise a confidential management matter. Wood asked if she should leave and Fery said yes. Schoelzel told Wood to remain. Fery stated that she would not

discuss the issue with Wood present. Schoelzel then asked if there were any other matters to discuss. When no other matters were raised, Schoelzel ended the meeting.

38. On July 3, Fery met with Lattimer and Debbie Bryant, who took notes of the meeting. She expressed concern about a number of actions by Schoelzel, including his conduct at the June 19 and July 1 meetings, his lack of explanation for his decisions, and that she felt Schoelzel was directive and patronizing to her. She also stated that she had a tremendous workload.

39. In early July, the DAS budget office reported that IRMD's operation fund balance was falling because, as of June 30, IRMD was spending approximately \$500,000 more per month than it received.

40. On July 8, Fery sent an e-mail to Schoelzel regarding his plans for the Operations unit help desk staff. Fery stated:

“* * * The entire Operations team has [*sic*] going in a different direction that [*sic*] you are prescribing now and you have not had the benefit of discussion with me or Lin or Phyllis about this.”

Fery requested that the issue be placed on the agenda for the July 12 GGDC management meeting.

41. On July 10, Fery sent Schoelzel, Michael, Freese, and Lattimer a detailed memo about the change in the Burns data storage rate and the transfer of the Burns positions to the Open Systems unit. In the memo, Fery argued that the rate change was counterproductive. She argued that the position transfer was an attempt to “fix * * * something that was not broken.” Fery wrote the memo in the face of Schoelzel's instructions not to challenge, after the fact, decisions he had made.

42. In a July 11 e-mail to Michael regarding her July 10 memo, Fery stated:

“* * * I am upset that there was no team decision making with this. I had to make sure that all the players were aware of this situation and to voice my concerns since I did not have the opportunity before.”

43. On July 19, at a weekly GGDC managers meeting, Schoelzel stated that he had decided to transfer Backup Tape Librarian Rhonda Charles, an Operations staff

member, outside of GGDC to perform other duties in the IRMD administrative unit on the floor below. The Charles transfer was part of a plan to move the billing services and other administrative functions of GGDC and other IRMD divisions to IRMD itself. Fery was out of the office at the time of the meeting; Schoelzel asked Connor to notify Fery.

44. On July 22, Schoelzel e-mailed Fery to ask her for a list of all the SLAs she was working on and their current status. On July 25, Fery e-mailed Schoelzel a spreadsheet listing all of her projects. When Schoelzel e-mailed Fery to repeat his request for the list of SLAs and their status, referring to an older list, Fery responded by asking for a copy of the project list Schoelzel was referring to.

45. On or shortly before July 24, Fery discussed the Charles transition with Schoelzel, who indicated that he wanted the transition to take place by August 12. In her July 24 follow-up e-mail to that meeting, Fery stated that she, Charles, and Connor had developed a "win-win" transition plan in which Charles would work in both locations until October 25, when Charles would complete the transfer of the backup tapes to other media.

46. On July 24, Fery wrote Schoelzel to express concern about another decision Schoelzel had made, and about Schoelzel's speaking to staff under Fery's supervision without speaking to Fery first. Fery wrote, in part:

"You did a complete 180 turn-a-round in front of me and another staff person, even after I specifically told you the history, the process and procedure and role of the GGDC staff involved. * * * What even concerns me more is that during this 1:1, I said 'do not devalue my staff and Terrie by taking away this professional development work' that I previously told you in explaining the history. You did not listen to a word I said, about history, process and procedure or staff desire and roles.

"* * * * *

"Bottom line: you got several staff upset, and created a communication nightmare, that did not need to exist.

"* * * * *

"* * * For you to say to me 'I talked to your staff and they say they can pickup the workload' and then further for you to go

through what you perceive the steps to be in migrating tape in front of Susan and me is deployable [*sic*]. * * *

“* * * * *

“I find this type of behavior to be highly un-teamwork oriented, embarrassing, defensiveness and hostility creating. If you would like to know the status of something that you hear in the hallway, through the grapevine regarding Operations staffs’ process and procedure please speak to me. It would save a lot of energy and emotion and my guess stimulate teamwork and communication.”

47. Schoelzel did not think the memo was appropriate, and did not respond to it.

48. On July 25, Schoelzel e-mailed his response to Fery’s July 24 e-mail about Charles. Schoelzel stated that he stood by his decision that the Charles transition take place by August 12. Fery then e-mailed the thread of e-mails to Schoelzel, Freese, and Lattimer, stating only, “I am asking to please implement my recommendation, as listed below.” Schoelzel responded, only to Fery, “Debbie, We will go with what was discussed and I hopefully clarified below. Thanks Pete.” Fery e-mailed the thread to Schoelzel and Freese, stating only, “I would like to get clarification on my request from Mike [Freese] or John [Lattimer], that is why I sent the e-mail. Because your solution does not create a win-win I was hoping for.”

CULMINATION OF SCHOELZEL’S ORGANIZATION PLANS

49. Since May, Schoelzel had been modifying the functional structure for GGDC as Freese had directed. Under Schoelzel’s new structure, GGDC would be comprised of two units reflecting the two types of computer systems it used, Mainframe and LAN/Desktop. The Operations unit would be eliminated. Operations staff would be distributed to the other units, depending on which computer system was most closely associated with their work. Schoelzel’s goal was to have employees work in groups based on similar job functions.

50. Schoelzel moved Dyer, in the Open Systems/LAN/Desktop unit, to supervise the former Operations staff in Burns. Frank Kuchta, in the same unit, was to take over the Operations staff that had been working on LAN/Desktop. Connor and the remaining Operations staff were to be moved to the Mainframe unit. Kenny Harrison, a data resource

manager and former subordinate of Fery, was placed in charge of the new "customer relations group" under the Open Systems unit. The work of the customer relations group was to include the preparation of contracts, or SLAs, with GGDC customers. The unit would also work on GGDC's billing.¹³ Fery would become a member of the customer relations group and report to Harrison.¹⁴ Schoelzel never disclosed his plans to Fery, except as they arose through the transfers of positions. She did not know of Harrison's promotion to supervise her until August.

JULY 30 WORK CUBICLE REASSIGNMENTS

51. Because of the restructuring of work, and to move workers to locations that matched their new roles, Schoelzel decided that some changes were necessary in the assignment of GGDC cubicle work stations.

52. In July 2002, Schoelzel contacted Korson about his proposed reassignment of cubicles. Schoelzel asked whether he should inform staff of the moves individually or in a group meeting. Korson recommended doing so in a group meeting.

53. On July 30, Schoelzel announced that there would be a meeting of all GGDC staff later that day. Most GGDC staff, including Fery, were unaware of the purpose of the meeting. Fery asked Schoelzel what would happen at the meeting, Schoelzel told her she would have to wait until then to find out. Fery asked Schoelzel if she would like the results of the meeting. Schoelzel said that some people would like the results and some wouldn't.

¹³It was Schoelzel's intention to have IRMD take over the contract and billing functions of GGDC in the near future. Fery was the only person fully knowledgeable about the GGDC billing functions. At the time of hearing, the transfer of this function to IRMD had not occurred.

¹⁴With these changes, Fery was directed to work under Harrison who had previously been suspended without pay and who had his trial service extended due to "leadership and managerial deficiencies." Harrison had also been relieved of his supervisory responsibilities on June 2, 2000. An October 3, 2000, disciplinary letter from Korson to Harrison summarized the reasons for the suspension without pay and noted hostile comments and behavior Harrison made to supervisor Debra Fery and to other staff. Korson wrote: "You have failed to follow explicit directions from management to demonstrate respectful, professional rapport and leadership within the work place. Instead, you create a hostile work environment and intimidate staff by your behavior. Your actions, therefore, fail to meet our performance standards for a manager in the GGDC. Your performance deficiencies jeopardize the GGDC's ability to deliver quality customer service and meet workload needs because you do not follow DAS policies and directions from your managers." Freese and Schoelzel did not consider this disciplinary action an impediment to promoting Harrison to supervise Fery and others in the GGDC unit.

54. Unlike GGDC work cubicle moves that predated his employment, Schoelzel had determined that the staff moves would begin immediately after the meeting. When the meeting began, Schoelzel told the staff that the moves should be completed by the end of the day, and that the changes in telephone hookups and computer connections would take place at the same time.

55. Schoelzel announced the changes with the staff gathered around him. He turned to face each staff member and told them where they would be moving.¹⁵ He told Fery that she would be moving from her large, centrally-located cubicle by a window to a small windowless cube on the fringes of the office near the help desk. Fery made an emotional outburst, stated that she would not move, and left the meeting and the office near tears. Only Fery complained about a cubicle reassignment. She was not told at the meeting that she was the only manager about to be demoted, but the cubicle shuffle was one more sign that Fery was no longer welcome as part of the GGDC management team.

56. Schoelzel had arranged the moves so that Deputy GGDC Manager Michael would take over Fery's cubicle, which was next to Schoelzel's cubicle.¹⁶ Michael's previous cubicle was more than 100 feet away from Schoelzel's cubicle. Fery was to move to Connor's cubicle, from which he had supervised as many as ten staff. It was the same size as the cubicle of Roberts, whom Fery considered to be a peer. Fery's new cubicle placed her closer to the employees she was to work with the most, but she had not yet been told of her demotion and new work assignment. Fery was assigned to share a desk at the edge of the cubicle with Leticia Gastelum, whom she used to supervise.

57. Early that afternoon, Schoelzel e-mailed Freese and DAS Personnel's Marianne Higham regarding the move. Schoelzel wrote:

"The meeting went well, except that Debbie stated that she would not move, having been in that cubicle for the past three years, and wanted to know if she should hand in a resignation now or at the end of the day. My response was, 'your call'. She left the meeting and from what I gather she has asked to meet

¹⁵Fery testified that Schoelzel pointed at each staff member in turn, an action she believed was significant and wrongful. Other witnesses present at the meeting, who weren't adversely affected by the changes, denied any finger-pointing took place

¹⁶Fery testified that Michael was not Schoelzel's deputy, arguing that all of the managers under Schoelzel were of equal standing, and had all pitched in to do the GGDC manager's work before Schoelzel was hired. We find that Michael did Schoelzel's work in his absence, and that she had, in fact, become his deputy.

with John at 3:00 PM today. Since she initiates the chain of moves and refused to move, I tried to contact HR if there was any reason for not having her items moved, if necessary. I'm waiting on a call back. DOIT's staff are waiting and also telephone staff will be working on moving the phone numbers. Debbie I believe has left the building. I'll keep you posted."

58. Early that afternoon Fery returned to her cubicle to get her purse. She asked Schoelzel if he wanted her resignation "now or at the end of the day." Schoelzel said that decision was "her call."

59. After retrieving her purse, Fery left the GGDC office to request a meeting with Lattimer. She met Lattimer and Bryant, who took notes of the meeting, shortly before 5 p.m. Fery described the events of the day. She stated that there was no plan for the move and that she had been told that her move was for functional reasons, to have her work closer to her staff. Fery stated that the issue was process—she objected to the fact that no one knew what the meeting was about. Fery stated that she wanted a position description, feedback into decisions, and to work in a team environment.

60. After Fery left the office, other employees moved the contents of her cubicle and stacked them on her new desk.

61. At 2 a.m. on July 31, Fery e-mailed Freese to say she was not coming to work that day.

62. On August 1, Fery came to work at 10 a.m. to find that her desk had been moved. She felt that the files and other materials had been haphazardly put in boxes and moved. Fery met with Freese and Higham. Fery perceived Freese to be amused at her distress. Fery requested, and was granted, an extended vacation. Fery was ultimately provided leave under the Family Medical Leave Act (FMLA) from August 1 through September 18, some of which was expected to be intermittent. Schoelzel was not involved in the decision to grant Fery leave.

REMOVAL OF FERY'S SUPERVISORY AUTHORITY

63. Schoelzel and Harrison viewed Fery's conduct at the staff meeting as unprofessional and inconsistent with her managerial status. Schoelzel decided to remove all

of Fery's remaining supervisory responsibilities immediately, instead of in a "month or so."¹⁷ Schoelzel also removed Fery's ability to access the mainframe computer electronically. He deactivated her card key to the machine room, where the mainframe computer and other equipment was located, and where staff meetings were held. He also reduced Fery's previously unlimited access to GGDC offices to regular office hours. Schoelzel believed it was prudent to take these steps to block Fery's access to computers and "mission critical" information because of Fery's strong response during the July 30 meeting. For the same reason, Schoelzel directed that GGDC staff keep an eye on Fery in the event she returned.¹⁸

64. On August 5, 2002, Schoelzel provided a new organizational chart to GGDC staff. The chart reflected the two-unit model (Mainframe and LAN/Desktop) described above. According to the new organizational chart, the responsibilities of GGDC staff Dave Dibble, Fery, Gastelum, and Debra Hunt were significantly changed or reduced.

65. The August 5 organizational chart reflected the elimination of Fery's supervisory role, identifying her position as "Service Level Agreements Specialist." The chart identified Fery's job classification as managerial.

66. After receiving the new organizational chart, Connor contacted Fery at home, told her about the reorganization, and gave her a copy of the chart. He also told her about the revocation of her computer access and about Schoelzel's instruction to keep an eye on her.

67. Having received no notice from her supervisor of changes in her work, on August 14 Fery e-mailed Freese and Higham. Fery stated:

¹⁷There is evidence that Schoelzel originally planned that Fery may have had some supervisory responsibilities after the move. On Page 8 of the Summer 2002 GGDC-Business and Technology Strategy, Fery is still listed as the "Operations Manager-Supervises Business Unit" Harrison was listed as the "Customer Relations and Planning Manager-Supervises Customer Relations" The Business Office, according to the strategy, was to administer the day-to-day business operations including the service level agreements. There are two other pages in the lengthy strategy which list Fery as a service level agreements specialist. Given that Fery did not know her supervisory work was being removed until after the cubicle-move meeting, Schoelzel may have intended for her to supervise a modified business unit as is noted in this plan. However, after the cubicle-move meeting, Schoelzel took action to discipline Fery by limiting her access to IMRD and GGDC equipment and operations. Her reduction in August, to doing only service-level agreements, was disciplinary and was not a result of the reorganization. Fery was neither liked nor trusted by her new supervisors and she was disciplined by exclusion from work.

¹⁸Fery also lost her ability to use her work e-mail account. The record is not clear whether this was simply a result of the cubicle move or of a decision by Schoelzel.

"I will be returning to my position as Operations Manager in the GGDC on the 19th.

"I would like to know if my work environment is going to be different, or is it business as usual?"

Fery also asked about her computer access privileges and whether it was true that "my staff have been told to watch me."

68. Higham forwarded the e-mail to Korson, who wrote Freese, Schoelzel, and Higham to suggest a phone call to discuss "the response to Debbie." He asked whether they had a list of duties for her to receive upon her return, and stated that "you need to be clear on her new role within GGDC."

69. On August 16, 2002, Freese e-mailed Fery. He enclosed a copy of the August 5 organizational chart. Freese wrote:

"Debbie, you will be returning to your position in the GGDC, but your duties and responsibilities are being changed. You will not have any supervisory responsibilities. A list of duties will be presented to you when you return.

"You retain your current classification and pay rate, but a reorganization of the GGDC has occurred.¹⁹ This reorganization will lead to a classification review of positions within the unit [²⁰] The attached organization chart shows how the work environment and reporting relationships have changed.

"Please report to Kenny Harrison at 8am Monday morning, August 19. Your access to any and all systems needed to do your job will be restored at that time."

¹⁹Fery was the only manager to lose her supervisory work in the organizational changes and was not told of the changes until after they were implemented. Fery's reduction in work assignments appears to have been selectively personal toward an employee who had fallen out of favor. After the cubicle move, Fery was treated almost exclusively as a disciplinary problem by her supervisors until she was finally terminated.

²⁰Fery's position, if retained, was likely to have been reclassified as a classified position, but according to Korson, Fery's salary would probably have been "red circled," that is, not reduced.

70. During August, Freese spoke with Korson about the organization changes and plans to eventually reclassify Fery's position.

71. Around August 19, Harrison sent Korson a draft of a new position description for Fery.²¹ In mid-October, Korson forwarded the draft to DAS HRSD. Neither Harrison or Korson discussed or gave the draft to Fery. A final position description was not completed as of the date of Fery's separation from employment and the proposed drafts for the position were not entered into the record.

FERY'S RETURN TO WORK

72. On Monday, August 19, Fery returned to work. She received another copy of the August 5 organizational chart and a memo from Harrison.²² The memo stated, in part:

"Your assigned duties as the SLA Specialist in the CRM [Customer Relations Management] unit includes the preparation of SLAs and their submission to the CRM manager for further processing and approval. You will be supplied the necessary data and information to draft an SLA. If you require additional information beyond what was provided to you to draft a particular SLA, contact the CRM manager and the appropriate staff will be assigned to gather the pertinent information and provide it to you. * * *"

73. In the past, any significant changes in work had led to other GGDC staff being given transition plans and, eventually, new position descriptions. In this instance, however, Fery was not given a transition plan or a new position description. She was never

²¹It is not clear if Harrison sent this to Korson before or after Freese recommended terminating Fery.

²²Harrison's previous position was below Fery in the GGDC hierarchy. Some of the staff who had worked closely with Fery did not trust him and believed he had engaged in conversations which were inappropriate for the workplace. Given Harrison's disciplinary history, and his former position, Fery and other staff believed that placing Fery under Harrison's supervision was another punitive and disciplinary act by Schoelzel.

Fery kept several Teenage Mutant Ninja Turtles on her desk. One day, Fery returned to her desk to find them arranged in a sexually suggestive fashion. At hearing, Harrison admitted that he had, on occasion, played with the turtles, but other employees had also. On another occasion, someone left a rubber glove dipped in chocolate on her desk. The record does not reveal when these incidents occurred.

told why she did not receive a position description. Harrison's memo and the organizational chart were the only formal guidance given to Fery about her new position. Harrison believed that creating a transition plan for Fery was "not his responsibility."

74. When Fery returned to work on August 19, she had very limited access to GGDC computer systems. She could not send or receive e-mail until August 22. She did not have a security card which opened the locked doors to the machine room. She also did not have electronic access to the mainframe computer. Because of the disciplinary action imposed by Schoelzel, Fery was, and remained until the time of her termination, the only on-site GGDC employee without access to the machine room and without access to GGDC offices on nights and weekends.

75. Harrison scheduled an informal "coffee meeting" on Fery's first day. Dibble, Fery, Gastelum, Harrison, and Hunt attended the meeting. Harrison did not have an agenda for the meeting, and all of the participants were uncomfortable. Fery left the table for a portion of time to take a telephone call from her physician. Fery also made some negative comments about the way the cubicle move and reorganization had been handled, and characterized the other GGDC managers as "spineless." Afterwards, Harrison reported the events of the meeting to Schoelzel.

76. On August 19 at 8 p.m., Freese e-mailed Korson and Higham the following message:

"Debbie's first day back at work was less than spectacularly successful. This morning, Kenny Harrison took the team out for a meeting over coffee to discuss roles, etc. Debbie immediately became argumentative, and proceeded to bad-mouth Lin Roberts, Phyllis Michael, Pete Schoelzel, myself and John Lattimer. She then went on to describe in great (but grossly inaccurate) detail how she has been mistreated, etc.

"It is my understanding that during the weekend Debbie called some staff at home and harangued them, then continued that behavior this morning. Last Friday afternoon, this group seemed generally cheerful and was looking forward to making a new start. Today, their morale is right back at rock bottom.

"Debbie has consistently demonstrated that she is unfit for any leadership/management role. Her continued and escalating inappropriate behavior is having a toxic effect on staff, and

renders her unfit for any role within this organization, period. I would like your help in proceeding as quickly as prudently possible through investigation and termination.

“Shawna will set up a meeting to discuss ASAP.”

77. The next day, Tuesday, August 20, Freese gave Fery a verbal reprimand regarding her comments at the meeting. Freese did not believe the comments, taken alone, warranted termination at that time. Early that evening, Fery e-mailed Higham and Korson to ask that they (1) interview all the staff at the meeting about what had happened, (2) interview Conner, and (3) interview GGDC staff regarding the impact on them of “what was done to [Fery].”

78. Fery also stated:

“I have a rebuttal letter to Mike Freese’s Clarification of Expectation, [*sic*] I have not sent it for fear of loosing [*sic*] my job. I have not come to Personnel on any of my personal issues with Pete or issues for fear and intimidation with Phyllis or Mike Freese for fear of loosing [*sic*] my job.”

79. On August 20, Harrison spoke with customer relations staff members Hunt, Dibble, and Gastelum, who were formerly supervised by Fery. Harrison indicated that he and Fery were adversaries, and that how the staff related to Fery would reveal to him which of the staff he could trust. Harrison told the staff that they were not aware of the “whole story” regarding Fery, and that they should not tell Fery that this August 20 meeting had occurred.

80. On August 22, Harrison gave Fery her first work project since her return, an SLA.

81. On August 23, as Fery had requested (and pursuant to Freese’s proposed discipline of Fery), Higham interviewed Dibble, Fery, Gastelum, Harrison, and Hunt about the coffee meeting, and generated a report which she gave to Korson. (Fery was not given a copy of this report.) Korson concluded simply that the meeting was not successful

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82. Because of Fery’s abrupt new cubicle assignment, reduced responsibilities, elimination of a supervisory role, reduced computer access, obvious lack of

prior notice, and the lack of any prior or subsequent explanation from management of these changes, Fery and other GGDC staff concluded that Schoelzel had punitively demoted Fery.²³ GGDC staff were shocked, fearful, and confused. Gastelum had “never seen anything like this in 23 years in state government.” GGDC staff, including those Fery had worked closely with prior to the move, acknowledged at hearing that they had, in Godfrey’s words, “shunned” Fery for the rest of her employment with GGDC. At least some staff observed Harrison and IRMD’s Susan Lind-Kanne expressing amusement at Fery’s new situation. On the floor below, where Charles and other IRMD administrative staff worked, Fery was “a joke.”²⁴

83. Fery did not meet privately with Schoelzel after July 30. Indeed, they rarely communicated directly in any form after that date. Between July 30 and December 31, 2002, Michael spoke with Fery once and e-mailed her three times. Freese had very few conversations with Fery since Schoelzel was hired in April 2002. Harrison and Fery met alone on August 19. They never met alone again until after Fery was notified of her termination in December.

84. After July 31, Fery, whose work as a unit supervisor had consisted mostly of “putting out fires” through numerous telephone conversations, personal conversations, and e-mailed correspondence, now received an average of one telephone call per day and only a few e-mails. She rarely spoke with anyone in person.

85. Meanwhile, some projects that Fery had been working on were assigned to other staff. Hunt was assigned to start a project from scratch that she later learned Fery had nearly completed.

²³Fery believes that the purpose of these cubicle moves was to humiliate her. Although the *manner* in which the moves and new responsibilities were announced and implemented would obviously embarrass and humiliate Fery, we find that Fery’s humiliation was not the *actual goal* of the *changes*, but an understandable result. Certainly Schoelzel did not appear to care whether the abrupt cubicle move might cause Fery to resign.

²⁴Fery became a permissive target of what is called “mobbing” in the workplace after Schoelzel removed her supervisor duties and her work place privileges. The behavior became authorized after Harrison indicated to staff that she and he were adversaries. “Mobbing,” according to authors Noa Davenport and Gail Elliot, “is a ‘ganging up’ on someone to force the person out through the use of rumor, innuendo, discrediting, humiliation, isolation and intimidation.” It “denotes a behavior by coworkers, superiors or subordinates, who attack a colleague’s dignity, integrity and competence, repeatedly, over a number of weeks, months or even years. * * * The result is always expulsion from the workplace.” See *Mobbing: Emotional Abuse in the American Workplace*, by Davenport and Elliot. Quotes are from a DNZ Training International review and summary of the book by Davenport, at the DNZ website (<http://www.dnztraininginternational.com/book.html>).

86. Between August and November, Harrison told Fery that he found it very difficult to supervise her. Fery responded, "I'll bet it is," and walked away.

IRMD AND GGDC BUDGET CRISIS

87. On August 31, 2002, DAS issued a budget status report regarding IRMD. The report stated that IRMD was still spending \$500,000 more per month than it was receiving. The report stated that the "IRMD cash balance may drop below zero."

88. In early September, an IRMD budget meeting was held to discuss its budget problems.

89. On September 3, Harrison asked Fery, who was the only manager who had comprehensive knowledge of GGDC's billing processes, to document that knowledge and transfer it to Gastelum, and eventually to IRMD.

90. On September 12, at approximately 1:30 p.m., Harrison e-mailed Fery to ask that she turn over all of her managerial files and work files that were not related to her work on SLAs. He also asked that she return her GGDC IBM laptop. Fery and Harrison exchanged terse e-mails in which she said she did not have an IBM laptop, and Harrison asked what had happened to it. The requests distressed Fery, and she left work on FMLA leave from September 13 until October 8, 2002.

91. On September 12 at 2:00 p.m., Fery called Higham to inquire about the status of the investigations of the GGDC manager hiring process and customer relations group coffee meeting, and to ask what was required to file a complaint regarding the DAS Harassment and Violence Free Workplace Policy. Korson e-mailed Fery to state that he or Higham had talked with the parties involved, and that he had no conclusions to share at that time. He invited Fery to provide him with any additional material she chose. Just before 5:00 p.m. on September 12, Fery responded that she intended to file "a complete formal complaint" regarding discrimination in GGDC manager recruitment, "[r]etaliation by asking if I was Discriminated Against," harassment and retaliation for reporting harassment, threatening behavior, hostile workplace, and failure of GGDC "to exercise reasonable care to prevent and promptly correct any harassing behavior." Fery stated that she planned to file the complaint in the following week.

92. Before Fery left the office on September 13, she completed her work on her pending SLA and sent it to Harrison. At hearing, Fery expressed frustration that Harrison did not provide her with another SLA to work on in response.

93. Harrison assigned SLA work to other members of GGDC staff during Fery's August, September, and October absences.

94. Prior to July 30, approximately 80 percent of Fery's work consisted of researching and writing SLAs, and she had a significant amount of e-mail and telephone contact with other GGDC personnel as well as with staff of the other agency involved in the prospective agreement. After July 30, Fery worked almost exclusively on SLAs, but Harrison gave her only a few to work on at a time, resulting in significant time in which she had nothing to do. Fery was also assigned to be Gastelum's backup, although Fery did not have access to the mainframe computer, where Gastelum did much of her work.

95. For several years, Fery gave management development presentations at an annual conference in San Francisco. Her travel to those meetings was paid for by GGDC. Fery was scheduled to give a similar presentation to a management development seminar in Lake Oswego, Oregon, and her name was on the seminar schedule. In September 2002, Fery asked Schoelzel for the use of a state car and Power Point projector for this conference. Schoelzel told Fery to turn over her conference materials to another manager, who was sent to the conference in her place. Schoelzel told Fery that he had taken this step because Fery was no longer a manager.

96. On September 12, Fery e-mailed Harrison to tell him that she would be out of the office for a meeting with Bob Cox. Harrison e-mailed back, "What is the nature of your meeting with Bob Cox? How does it relate to your current assignments? —Kenny." Fery did not respond. Cox worked for State Accident Insurance Fund on Fery's workers' compensation issues.

97. On October 2, Fery e-mailed Harrison asking whether she should use a template for the SLA she was working on or start from scratch. Fery knew, or should have known, that the question was unreasonably trivial.

98. On October 3, Fery responded to Harrison's September 12 request for files. She asked Harrison to give her a list of what he needed.

99. On October 11 at 1:30 p.m., GGDC had a previously unannounced all-staff meeting in the machine room. Such meetings were common, and staff were often notified to attend only by word of mouth. Fery returned from lunch at 1:35 p.m., but did not appear at the meeting. Later that day, Harrison e-mailed Fery regarding her failure to attend, stating that "[y]our absence was noted. Please explain." Fery responded by an e-mail to Harrison, Schoelzel, and Korson:

“I was at my desk at 1:35 pm after returning from lunch. I was not informed of any meeting prior to leaving for lunch, which yourself and Pete were at the Security Window and did not mention a thing to me as I left. Even if a note was left on my PC, I do not have access to the machine room to attend meetings that occur or are scheduled there. I find knocking on the machine room door to let me in hostility creating and awkward [*sic*], not only for me but to other GGDC staff.

“* * * * *

“I am sure you questioned other CRM team members on there [*sic*] whereabouts also for meeting as well like last Thursday, for example [*sic*] As well, I am sure other GGDC staff members were not in attendance given the just-in-time nature of this meeting, so I am sure you are questioning them as well and not just singling me out.”²⁵

On October 14, Fery e-mailed Korson to inquire again about the status of his investigations of the GGDC manager hiring process and customer relations group coffee meeting.

100. Shortly before October 15, Fery was given notice that she would again be changing cubicles on November 15. On October 17, Fery e-mailed Schoelzel stating that she didn't want to move to the assigned cubicle because she did not want to sit across from Harrison. Schoelzel declined to respond to the e-mail, or direct that Fery move to another cubicle, because she did not state why she did not want to sit across from Harrison. Fery sent another e-mail seeking clarification, and received no response.

101. On October 17, Fery e-mailed Korson, with a copy to Schoelzel. Fery stated that she did not wish to move near Harrison because of his history with her and other staff, and because he was doling out small amounts of SLA work to her, leaving her to beg for work, while others recreated work she had already done. She stated that because she had

²⁵Based on the testimony of Fery and Harrison, and the relevant exhibits, we find that Fery may have been aware of the meeting but declined to attend because (1) she hadn't been personally notified by Harrison and Schoelzel on her way to lunch, and (2) she believed it would be humiliating for her to knock on the machine room door because it would emphasize to other employees that Schoelzel had rescinded her access to the machine room.

templates for most SLA subjects, little more than replacing the customer name was necessary. Fery concluded:

“My [mainframe access] is still revoked and my [security] badge has been downgraded from level 4 to level 1. I have little to no work to complete and I have to request work, just as Janet has today. My skills, ability, talents are not being used. Staff are scouting and are requested to report. You have the interview notes from the Coffee Meeting, you have the memo from Mike Freese. What additional information do you need to substantiate DAS Violence and Harassment free workplace Policy violation [sic].”

102. On October 18, Korson e-mailed Fery to state that he would treat Fery’s October 17 e-mail as a “formal complaint that IRMD had violated the DAS Violence and Harassment Free Workplace Policy.” Korson suggested that they meet to discuss her claims. Korson sent a copy of Fery’s inquiry and his response to Schoelzel, Freese, Lattimer, and Sealock.

103. On Saturday, October 19, DAS Budget Officer James Carbone sent an e-mail to Robert Cameron, Freese, Lattimer, and Sealock, stating that “IRMD is approaching a financial crisis.” The memo recommended that IRMD develop a plan before the end of November and implement it before January 2003.

104. In response to Carbone’s memo, IRMD management held an emergency meeting on Monday, October 21, at 8:15 a.m. IRMD asked each of its divisions to reduce positions and other costs. Freese began drafting a series of salary packages, which included reclassifying some positions downward and others upward, abolishing some positions and creating some new positions, sometimes for more or less salary cost. Fery’s position was not affected by Freese’s early draft changes.

FERY’S REDUCED WORKLOAD

105. Throughout October 2002, Fery and Harrison exchanged terse e-mails. Fery repeatedly e-mailed Harrison to tell him that she had no work to do. Fery believed that she was being spoon fed a few projects, resulting in her having nothing to do while she was waiting for other parties to respond to her requests for information. Harrison believed that Fery was refusing to exercise initiative and follow up on her requests to obtain the needed information.

106. On October 31, Fery e-mailed Harrison to say, "I have had no work to do for a full day now." She copied Korson, Michael, and Schoelzel with the e-mail. On the same day, Korson e-mailed Harrison asking, "What is the latest? Is this true?" Also on October 31, Harrison e-mailed the following response to Korson:

"Debbie Fery's claim to be out of work is out of context. She has SLAs to be completed, but is using the excuse that either staff and/or customers haven't responded to her requests for input. She had assignments yesterday. Debbie has been assigned SLAs to complete, however she needs to follow up with people who owe her a response. Honestly, Jerry, after the major SLAs on her plate are completed, there will be no work for Debbie Fery in the role of SLA Specialist, and I will no longer require the position."²⁶

107. On November 6, a representative of another agency suggested a meeting with Fery to discuss their SLA, but also stated that they were swamped. Instead of attempting to schedule a meeting, Fery told the representative to get back to her when they could

108. Shortly after November 6 and 7, 2002, Fery sent status reports to Harrison indicating that she had no work to do on those dates. Fery had scheduled a meeting with another agency to discuss an SLA, but they had canceled that meeting.

ABOLITION OF FERY'S POSITION

109. In early November 2002, after a Sunday, November 3, IRMD managers meeting, Schoelzel gave up five GGDC positions due to the funding crisis, not the reorganization. Those reductions did not result in the layoff of staff.

110. In early November, at Schoelzel's request, Wood e-mailed Gastelum seeking an internal breakdown of IRMD billing by month. Gastelum asked Fery about the

²⁶Harrison testified that eliminating Fery's position as described in this e-mail was his idea. The e-mail and his treatment of Fery connect with the August 19, e-mail from Freese suggesting that Fery be terminated because of the way in which she had acted in the August 19 meeting with Harrison. Taking away most of her work privileges from that date on made it likely that Fery would quit or be terminated. We find it unlikely that a lower level GGDC manager would e-mail Korson directly to propose eliminating a position and assume Harrison had prior approval from Schoelzel or Freese

matter, and Fery provided her with the appropriate report number. Fery then e-mailed Schoelzel and Harrison to say:

“Leticia [Gastelum] showed me Kenny [Harrison]’s request for the breakdown. Leticia did not play this role ever. Debbie Fery is the person who tracked revenue and expenses at the GGDC budget level. I know the budget from the revenue and expense side very well.

“I passed the spreadsheet to Leticia to meet Kenny’s request. After yesterday’s presentation, I was hoping it would be clearer to you and Kenny what Debbie Fery’s is/was and what Leticia role [*sic*] - the level of understanding from micro to macro is very different. Looks like this did not happen. I am continually amazed that your source of what exactly my job and role is comes from everybody but me.”

111. On November 7, Roberts and Harrison asked Fery to meet with them about the IRMD billing issue. Upon arriving, Fery was presented with a memo asking her to explain the e-mail quoted above. Harrison and Roberts wanted to know why Fery wrote it, and why she had written it in the third person. Fery, thinking the meeting was to be about the substance of the billing, refused to participate further without representation, citing the advice of her attorney. Harrison ended the meeting and did not pursue the issue further.

112. Within “two to three weeks” after giving up five positions which did not precipitate any layoffs, Schoelzel was asked to identify another position to be eliminated. Schoelzel chose Fery’s position. At hearing, Schoelzel noted that Harrison had told him that Fery’s contract preparation work could be shifted to other GGDC staff. He also noted that Fery’s operations manager salary was more than her new assignment required and would provide valuable budgetary savings to GGDC and IRMD. Schoelzel did not make the final decision about the elimination of Fery’s position. Freese, Korson, Lattimer, and Cameron also reviewed the decision, from differing perspectives.

113. In “early to mid-November,” Freese prepared his eighth version of a budget proposal regarding the employee positions in GGDC.²⁷ The spreadsheet included the reclassification upward of 14 positions and the abolition and re-establishment upwards of

²⁷We assume it was actually in mid- to late-November since Schloelzel set the five positions for elimination after the November 3 meeting, and indicated that two to three weeks later he was told to select another position. According to his testimony, he chose Fery’s position for elimination at that time.

three positions which were listed as "vacant."²⁸ The cost of increasing these 17 IRMD positions was \$17,099 per month. This was the first formal budget proposal to include the abolition of Fery's position.²⁹ Eliminating Fery's position saved IRMD \$6,996 a month. The proposal would also abolish the position of Steve Davison, a retiring GGDC employee.

114. Later, IRMD prepared a final version of its plan to address the budget crisis. The plans included the elimination of three FTE positions, including those held by Fery and Davison. Fery was the only person who would actually lose her job.

115. On November 15, Fery's cubicle was moved. Michael walked by and asked Fery how she liked her new cubicle. Fery responded, "no comment."

116. On November 19, 2002, Freese wrote Korson an e-mail on the subject "Debbie Fery Position." Freese wrote, "Jerry, here's some additional information justifying the abolishment of Debbie Fery's position.³⁰ Let me know if you think this is sufficient, and/or if this needs to be in memo form or some other format." The e-mail went on to describe the GGDC reorganization from three to two sections that had taken place in the summer. The e-mail concluded, "[a]s a result of these changes, the Operations section no longer exists. The operations manager position, which Debbie Fery occupies, is no longer necessary, and we intend to abolish this position in our pending reclassification package. Please let me know if you have questions or need additional information."

117. Also on November 19, Freese prepared a letter for Lattimer's signature regarding several aspects of the IRMD reorganization, including reorganization of GGDC. Freese wrote that, as a result of the GGDC reorganization, some positions needed to be reclassified upwards, and Fery's position was abolished. Freese wrote:

"Debbie Fery currently occupies a Principal Executive/Manager E position * * * in the GGDC. This position formerly oversaw the operations section which included administrative

²⁸The three abolished and re-established positions listed as vacant were "info sys Spec 8" positions with salaries increased upward to \$6,011 a month. The record does not indicate whether Fery was offered one of these positions

²⁹Freese created no document which described the specific savings from eliminating Fery's position alone.

³⁰We note that Freese identified the position to be abolished with the personal name of the employee, not the Operations Manager Position. Abolishing Debra Fery as an employee, and justifying this action, appears to be the primary motivation behind this e-mail.

functions, help desk, and general operations. The administrative functions are being centralized in the administration office. The help desk and general operations functions have been reorganized, to be more closely aligned with the units they support, and to provide more effective customer service. The operations section no longer exists. The Principal Executive/Manager E Position is not needed in the new organization, and is hereby abolished.”

118. The memo dated November 19, 2002, by Freese, was Korson’s first notice that GGDC was formally seeking to abolish Fery’s position, instead of terminating her for disciplinary reasons. He had received Freese’s e-mail of August 19 suggesting a disciplinary investigation and Fery’s termination, and the October 31 e-mail indicating Harrison had no work for Fery.³¹

119. Freese forwarded his proposals to abolish Fery’s and Davison’s positions to DAS personnel. The package also included reclassification upwards of five positions, three of which had reported to Fery before Schoelzel’s reorganizations. The package moved some employees out of GGDC and held several GGDC positions vacant.³² Davison’s position was already vacant.

120. In December, IRMD itself began a reorganization process.

FERY’S LAYOFF

121. On December 2, 2002, Korson notified Fery of the abolition of her position effective December 31. On December 5, Fery asked Korson to change the effective date of the layoff to January 1, 2003, for tax reasons, and on December 5, Korson advised her that he had granted that request.

122. At the time of her layoff, Fery was the only IRMD employee who was involuntarily laid off without having another position to move to. The merging IRMD and P & D had approximately 300 employees during this time period. At the time of her

³¹We assume that he was also aware when Schoelzel limited Fery’s access to most of the vital work functions for GGDC in August.

³²The request to reclassify the employees was made because the organizational changes had changed the employees’ jobs. The deadline for these reclassifications for budget purposes was January 1, 2003.

termination, Fery requested consideration for the same, equal to, or lower classification work in any statewide vacancy. She was placed on the statewide reemployment list

123. On December 5, Fery filed a grievance under state Policy 70 000.10 (Management Service Grievance Review). She stated that her termination was retaliation for reporting discrimination, and that she had been subjected to a hostile and violent workplace. She named Harrison, Michael, Schoelzel, Freese, and Lattimer as individuals who had contributed to the wrongful conduct and wrongful termination. She recited the same list of policies violated as in her letter, dated October 17, 2002, to Korson, and added claims that she had been discriminated against because of reporting a hostile work environment, and that GGDC had violated a policy of equal pay for equal work.

124. Korson reviewed the budget documents supplied by Freese and wrote a memo, which stated in part:

“Upon receipt of the package I identified two positions with incumbents that are to be abolished. Each person was notified of the proposed action in compliance with appropriate personnel rule and labor agreement. One position was a management position and the other position is represented. The management individual was processed in compliance with State policy 50.025.01 and the represented employee was processed in compliance with the current bargaining unit agreement (SEIU-OPEU).”

125. On December 12, Fery reported to DAS/HRSD that she would be taking vacation time until the date of her layoff. Fery had over 300 accrued vacation hours and would lose those accrued beyond 250 hours.

126. On December 30, 2002, Korson formally provided to Cameron the final IRMD reclassification package, which included a statement that the process of eliminating positions and providing notices of layoff had been completed. This was the last act of IRMD in connection with this response to the budget crisis. In the end, only two filled positions were abolished, those occupied by Fery and Davidson. The package abolished some vacant positions, and included both upward and downward reclassifications of positions.

POST-LAYOFF EVENTS

127. Korson reviewed Fery's complaints about a violent and hostile workplace. Although his report was not completed at the time of hearing, Korson's tentative conclusion was that Fery's work environment was not violent or hostile.

128. The GGDC functional changes, which began in June 2002, continued after Fery's position was eliminated. According to Schoelzel, GGDC's role regarding state government and the work done by GGDC employees has changed since December 2002, but the nature of those changes was not submitted for this record.

129. Between January 1, 2003, and the date of hearing, some of the projects Fery was responsible for were completed while others have languished.

130. At the time of hearing, SLAs were still prepared by Harrison's customer relations' group. However, they are handled less formally than at the time of Fery's employment. For example, the documents are no longer signed by representatives of the agencies involved.

131. Plans to have IRMD take over from GGDC all billing and help desk services for all departments had been shelved at the time of hearing. However, the GGDC billing system has been simplified and streamlined, requiring less ongoing work by GGDC staff. Some nontechnical billing work has been shifted to technical employees, who are not comfortable with that work.

132. At the time of hearing, GGDC was short staffed in all areas. The customer relations' group had added some employees and has taken on some additional responsibilities. Harrison remained the manager of the group.

133. Fery was the only GGDC employee involuntarily removed from state service between December 21, 2001 and May 7, 2003. Of 320 employees in the post-merger IRMD and P & D, three employees were involuntarily removed from state service: (1) Fery; (2) a P & D graphics employee who refused to bump another employee; and (3) a P & D employee who was laid off, but returned shortly thereafter to fill a vacancy.

134. The positions of several employees were reclassified after Fery's layoff.

135. As of May 8, 2003, GGDC had hired three individuals. None of these positions required work comparable to the management work done by Fery.³³

136. In February 2003, Charles returned to GGDC, but with a different position and type of work. She now works in the customer relations' group under Harrison.

137. As of April 26, 2003, the IRMD budget was in balance. The record does not indicate how the removal of Fery affected the effort to balance the budget.

CONCLUSIONS OF LAW

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

2. The State unlawfully removed Fery from management service under ORS 240.570(2). Her termination was not due to legitimate organizational changes or lack of work, and as such, her removal from management service was done in bad faith and violated Fery's rights under ORS 240.570(3).

The core of the dispute is the reason for Fery's removal from management service. The State contends that Fery was properly laid off in the course of a reorganization pursuant to ORS 240.570(2). Fery contends that her termination was disciplinary and was motivated by personal animosity and bias toward her on the part of Harrison, Schoelzel, and Freese. As such, it would be governed by ORS 240.570(3).

We summarize the arguments for each position.

A. Argument that Fery's layoff was unlawful.

Given this record, we conclude that following her return to work in August, Fery was upset about being passed over for promotion, her effective demotion, and her supervision by a former subordinate whom she did not respect. In response, she resisted supervision, insisted on literal instructions, and complained about her new assignment. Meanwhile, Harrison and other GGDC and IRMD managers became increasingly frustrated by Fery's attitude. They felt that Fery was arrogant, self-righteous, blunt, resistant to direction, and more than willing to criticize her managers in front of others or in e-mails

³³Although she had requested recall to positions, if necessary, lower than her current position, the record does not indicate that Fery was offered a recall to any position. The layoff from management service resulted in a termination of employment with the State of Oregon

copied to their superiors. In response to similar conduct toward her by others, Fery reacted and asserted that she was being victimized. After repeatedly being informed by Fery that she lacked sufficient work, GGDC and IRMD managers pretended to take her at her word and abolished her position.³⁴ The real reason for her removal, however, was personal to Fery—the removal was discipline for the attitude and actions described above.

B. Argument that Fery's layoff was part of a legitimate reorganization.

The State argues that after the July GGDC reorganization, Fery was no longer performing duties at the level of the GGDC principal executive/manager E position for which she was being paid. Fery was performing the duties of SLA specialist, a job which did not require managerial status. When the agency's financial crisis worsened later in the year, it took the logical and necessary step of eliminating Fery's position to save money.

We must decide the motivation for the employer's removal of Fery. We determine motivation for an action by the evidence presented. *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (May 1993), *reconsid* (June 1993), *reversed and remanded on other grounds* 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). An employer's motivation for acting is a question of fact. *Shockey v. City of Portland*, 313 Or 414, 438, 837 P2d 505 (1992), *cert. den.* 507 US 1017 (1993) (Unis, J. concurring and dissenting) (citing *Stever v. Independent School District No. 625*, 943 F2d 845, 851 (8th Cir 1991)); and *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 626, 16 P3d 1189 (2000).

The facts here show that there was a reorganization, but Fery's position was not eliminated as part of that reorganization. It was eliminated four months after the reorganization, allegedly for budget purposes. We note that at the same time IRMD removed Fery because of alleged budget concerns, it also made a number of other changes that increased IRMD's personnel costs by \$17,099 per month.

Although GGDC managers had indicated that Fery's position would be reviewed for a new classification, GGDC submitted no evidence that any actual steps had been taken to reclassify the position.

It is apparent from the evidence that GGDC intended to either maintain Fery as a managerial employee in some capacity after the reorganization or to treat her in such a

³⁴The fact that this is a fate Fery may have courted in numerous interactions with GGDC managers would be relevant to a disciplinary discharge. Loss of her job as part of the reorganization cannot be based on misconduct, attitude, or relationship to her supervisors

manner during the organizational changes that she would resign. The August 9 Strategy Plan indicates she would have a place on the management team. During the organization changes in the summer, Schoelzel gave up five vacant positions and Freese submitted an employee cost package that did not even mention reclassifying Fery's position. In the summer, when the reorganization actually took place, GGDC stood to gain an immediate financial benefit from laying Fery off and eliminating her position. It chose instead to keep her on as an employee. When she returned from leave to a diminished work assignment, however, both the SLA work and billing work Fery did was reduced in importance and complexity.

Given the financial crisis, Fery's position could have logically been terminated then, as part of the reorganization in the summer. However, in December when Fery was terminated, both GGDC and IRMD were short-staffed and continued to be short-staffed at the time of the hearing. Fery might have been kept on as an employee, but after she reacted strongly to the cubicle reshuffle and was vocal about what she felt was management indifference to her situation, her supervisors chose to isolate her as a form of disciplinary action. In August, her immediate supervisor declared a form of workplace war on Fery. This was followed by employee gossip and shunning of Fery. We can draw no other conclusion than that she became a personal target for disciplinary termination by GGDC managers, and as a result, she was discharged. Fery was not laid off as a legitimate part of the reorganization.

Even if we were to accept IRMD's assertion that it eliminated Fery's position for budgetary reasons, the removal was, nevertheless, unlawful. IRMD relies on ORS 240.570(2) as its authority to remove Fery. As we will see in the discussion below, this subsection applies only when there is a reorganization or lack of work. Budget problems are not a basis for removal listed in the statute, and IRMD has failed to prove a connection between the budget problems and a reorganization or lack of work.

We agree with Fery regarding the real reason for her removal. The facts show that the employer was motivated by cumulative and egregious personal animosity toward Fery and her removal was a disciplinary action by the employer. Fery was not laid off from management service in good faith as part of a reorganization. Rather, she was terminated for personal disciplinary reasons several months after the reorganization.

We find it significant that Harrison prepared a new job description for Fery in August in conjunction with the reorganization. This, along with the fact that there were vacant positions, leads us to conclude that there was work for Fery even after the reorganization. However, because of the difficulty of the relationship, no one ever gave Fery her new job description, and Harrison never transitioned her into her new position because

he did not believe it was his responsibility as her supervisor.³⁵ Relatedly, from the time she came under Harrison's supervision, Harrison's supervisor, Freese, was discussing terminating Fery for disciplinary reasons.

Nothing in the record subsequent to IRMD's decision to retain Fery under a modified job description demonstrates a change in circumstances that would justify or explain eliminating Fery's position four months later as part of the reorganization. To the contrary, the record shows that any position cuts made after the August 2002 reorganization were due to budget preparation for the next legislative session and were not part of the reorganization. There was ample work within IRMD when Fery was terminated from employment, but it was not offered to Fery.³⁶ IRMD's attempt to link Fery's removal to a reorganization that occurred four months earlier is not credible.

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 such employees from the management service due to reorganization or lack of work.”

“(3) A management service employee is subject to a trial service period established pursuant to rules of the Personnel Division under ORS 240.250. Thereafter, management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.”³⁷

³⁵Harrison acted contrary to settled practice. In the past, GGDC employees whose work was significantly changed received a transition plan. Harrison chose not to follow this procedure for Fery.

³⁶We note that IRMD may have continued to have budget problems after the reorganization, but the reorganization was well underway in May before any announcement of the budget issues. The budget issues were not the foundation for the reorganization. It was initiated and implemented over a 90-day period because of a change in management.

³⁷An employee removed under Subsection (3) has appeal rights under ORS 240.570(4) and ORS 240.560(4).

Fery asserts that she was removed from management service for disciplinary reasons. A disciplinary removal from management service under subsection (3) must be in good faith and for cause. ORS 240.560(4). In an appeal of a disciplinary removal, the State has the burden of proof. OAR 115-45-030(6).

The State alleges that Fery was removed from management service under subsection (2) for nondisciplinary reasons, *i.e.*, due to a reorganization or lack of work, and that she therefore has the burden of proof in her appeal.³⁸ OAR 115-45-030(6); and *Rosevear and Tetzlaff v Department of Corrections*, Case Nos. MA-4/6-97 (February 1998).

We first determine whether there was a legitimate reorganization by reviewing the standard in *Rosevear*. There we wrote:

“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* at 11 (emphasis added).³⁹

We do not dispute that the inception of this reorganization was legitimate. But the implementation in terms of Fery’s termination was not a legitimate result of the reorganization. Historically, we do not second-guess the employer’s decisions regarding a reorganization unless we find evidence of another motivation for a management service layoff or termination. *Knutzen, ibid.* And while we have not found such evidence in prior

³⁸Fery’s burden was to prove that her removal was done in bad faith and was not due to the reorganization. The State’s burden was to prove that the reorganization was legitimate and Fery’s termination a good faith result of the reorganization.

³⁹Our dissenting colleague accuses us of failing to articulate a standard. We adopt and apply the standard of *Rosevear and Tetzlaff v Department of Corrections*, Case Nos. MA-4/6-97 (February 1998), quoted above, a reorganization must be rational, bona fide, made in good faith, and not a sham for another purpose. The dissent would apparently adopt a far more deferential standard that takes the State at its word and would not look behind its claim of reorganization to determine the true nature and purpose of an employee’s removal. We believe our statutory obligation goes further. Employees do not lose their rights under subsection (3) solely because the State *says* it acted under subsection (2). We must examine the record as a whole to determine what occurred and why. We have done so and find that the preponderance of the evidence is that the reorganization, at least as it was applied to Fery, lacked good faith and was a pretext for a disciplinary removal.

cases, we find that the egregious conduct of the employer toward Fery during and after the reorganization provides the point at which we draw the line.⁴⁰

The initial decision to reorganize was not personal to Fery. Indeed, the evidence indicates that the initial reorganization plan kept Fery as an employee. However, Fery's work relationships deteriorated. The State did not eliminate Fery's position until four months after the initial reorganization. The State asserts it acted in response to a budget crisis. This assertion is undermined by the fact that at the same time it was eliminating Fery's position, IRMD was increasing its personnel costs by more than \$17,000 per month. From the troubling facts in this record, we conclude that the reasons given by the State are a sham. The decision to remove Fery from employment was personal and she was discharged for disciplinary reasons.

In *Schaaf v. Eugene School District No. 4J*, 19 Or App 838, 529 P2d 943 (1974), the court noted a common-law distinction in the reasons for terminating a public employee. A public employer may act for personal reasons, such as misconduct or incompetence, or for nonpersonal reasons, such as lack of work or reorganization. The legislature has incorporated this distinction into the statute. It separates personal reasons (ORS 240.570(3)) from nonpersonal reasons (ORS 240.570(2)), and applies a separate standard for each. The dispute here, as framed by the parties, is whether the State removed Fery as part of a reorganization under subsection (2), or whether the removal was disciplinary under subsection (3). In resolving this dispute, we will take into account the legislature's intent to distinguish between personal reasons and nonpersonal ones. Based on a review of the record as a whole, we find that the State removed Fery for personal reasons rather than for nonpersonal ones as it asserts.

The facts presented in this case are primarily about the relationship between Fery and her supervisors, and the discipline imposed on Fery. The smattering of facts regarding the reorganization does not lead us to conclude that she was removed *because of* the reorganization. It is not enough that there was a reorganization. The employer must prove

⁴⁰Our dissenting colleague ably outlines the facts in a number of our prior cases. He is correct in writing that we have not previously overturned a management service removal when we found that the removal was the result of a legitimate reorganization. Although some of those cases bear superficial similarities with this one, none has the same facts, and none has caused a majority of this Board to reject the State's assertion that it acted as part of a legitimate reorganization. The dissent too readily accepts the State's assertion that it removed Fery as part of a reorganization, despite overwhelming evidence that its real motive was personal to Fery. We do not question that the State conducted a legitimate reorganization. We do, however, question whether Fery's removal was part of that reorganization. We apply the well-established standard of *Rosevear* and find that attempting to include Fery's dismissal in the reorganization was a sham or contrivance, and that the State, in fact, removed Fery from management service for disciplinary reasons.

that the manager's removal from the service was a result of the reorganization. The State has failed to make that connection.

The facts here are extraordinary and unlike the facts in any prior case of this type. If, as our dissenting colleague concludes, the type of employer conduct exhibited toward Fery demonstrates good faith, then we do not know what would be required for a finding of bad faith. This is the first time we have concluded that a management service employee was a victim of mobbing that was initiated by her supervisor. Mobbing activities, followed by employment termination, are personal to Fery and are not signs of good faith.⁴¹

DISCUSSION

Freese admitted in testimony that GGDC was operating on two tracks regarding Fery—a reorganization track and a discipline track. We take Freese at his word.⁴² The issue here is whether Fery's ultimate termination was the legitimate result of the reorganization track or a procedurally flawed result of the discipline track. Based on a preponderance of the evidence, we conclude the State acted on a procedurally flawed disciplinary track.

a. Fery's Reassignment and Discipline

In the spring and summer of 2002, Fery's employment relationship with her new managers was shaky at best. She got off on the wrong foot with Freese when he was hired by asking questions that embarrassed him in a staff meeting. Her declining role on Freese's management team was highlighted when Fery did not make the first cut in the hiring process to fill the vacancy left by her former immediate supervisor. The person who was hired to manage GGDC, Pete Schoelzel, quickly began to exclude Fery from decisions affecting the supervision of her unit and bypassed her in discussions with other staff in her areas of expertise.

⁴¹Researchers Noa Davenport, Ruth Schwartz, and Gail Elliott describe mobbing as follows:

"Mobbing is an emotional assault. It begins when an individual becomes a target of disrespectful and harmful behavior. Through innuendo, rumors, and public discrediting, a hostile environment is created in which one individual gathers others to willingly, or unwillingly, participate in continuous malevolent actions to force a person out of the workplace." Noa Davenport, et al., *The Mobbing Syndrome: Emotional Abuse in the American Workplace* at 10 (1999).

⁴²The State admits Fery was being actively reviewed for discharge during the months prior to her removal

At the direction of Freese, Schoelzel reorganized the functional structure of GGDC. It appears from the Summer 2002 Strategy Plan for the GGDC that Fery was initially intended to be reshuffled to become a manager for business functions. Both she and Harrison are named as managers in the Plan. However, Fery never received that new title. After her reaction to the July 30 cubicle move, the State took disciplinary action against Fery that removed her from supervision and from contact with most significant functions of her work.

Shoelzel issued a new organizational chart on August 5, 2002, that promoted Harrison to be Fery's supervisor. Harrison was formerly one of Fery's subordinates who had previously been relieved of his supervisory duties. Less than two years earlier, the State disciplined Harrison, in part because of his hostile comments and behavior toward his then-supervisor, Debra Fery. The disciplinary letter also noted that Harrison creates a hostile work environment and intimidates his staff. Based on this history, the appointment of Harrison as Fery's supervisor, along with the removal of her supervisory duties, were part of the disciplinary actions imposed on Fery as a result of management's displeasure with her actions at the July 30 meeting. As pertains to Fery, the employer's efforts became increasingly harsh and personal after that date. Management embarked on a systematic campaign to humiliate and ostracize Fery in an apparent effort to force her to resign.

Legitimate reorganization efforts do not become personal to specific employees. Here, however, and partly because of her attitude toward the reorganization process in general, Fery was singled out for demeaning treatment, excluded from management team decisions, and with no notice, moved to a smaller cubicle in a remote location in the division. She was directed to share a desk space with a former subordinate and assigned a supervisor who was also a former subordinate. The personal nature of Fery's treatment by her superiors following the reorganization, including isolation, discipline and ultimate employment termination, is obvious.

After the July 30 meeting, Fery was locked out of her e-mail, had her access code changed for computer functions having to do with her work, and was not given keys to a critical function room in the division. While she was on family medical leave, a new organizational chart was issued, but she was not advised until just before returning from leave that she was no longer a GGDC unit supervisor. Fery was assigned as Gastelum's backup, but was denied access to the mainframe computer on which Gastelum did much of her work. Projects Fery had nearly completed were reassigned to other staff who were directed to start the project from scratch.

Although Fery was highly qualified and received excellent work evaluations prior to working for the new management, after her job assignments changed, Fery was ridiculed by some employees and managers. In a form of shunning, employees were told that

they had to watch Fery and report what she was doing. Fery's new supervisor, Harrison, told employees in the unit that Fery was his adversary. He said that the manner in which staff related to Fery would reveal which of the staff he could trust. Fery was expressly excluded from the vitality of the division's work by the GGDC manager, and Freese sent an e-mail on August 19 indicating that disciplinary termination proceedings should begin immediately to remove Fery as an employee. Just three months later, when Fery had not resigned in response to the isolation and management mistreatment, she was notified that her position would be abolished and her services no longer needed by the State. Although Fery was highly qualified and IRMD was understaffed, Fery was not offered alternative work. Fery was the only employee to actually lose her job after the purported reorganization.

b. Elimination of Operations unit

As a result of changes in the upper-level management and pressing IRMD budgetary issues, GGDC's staffing was reorganized in July 2002.

Although we conclude that the termination of Fery was done in bad faith, we reject Fery's contention that GGDC's entire reorganization was devised solely to get rid of Fery. GGDC's reorganization, independent of Fery's layoff, does pass muster under our standards of review. *Rosevear* at 11 and 13. The reorganization of GGDC and the elimination of the Operations unit as it had formerly existed appears intended to advance the efficiency and effectiveness of GGDC. The reorganization met the objective goals set out by Schoelzel. However, Fery was the only employee in the reorganization to actually lose her job, and there is little or no evidence that Fery's removal four months later was a legitimate part of the reorganization. The adverse actions taken against Fery personally during that period call into question the credibility of the State's position that her termination was primarily the result of eliminating the Operations unit.

Of course, Fery's disagreements with Schoelzel's decisions, and Schoelzel's responses to Fery's actions, were related to the events of the reorganization and influenced how decisions were announced and implemented. Fery was not present when several decisions were announced, and the public announcement of her cubicle move, under the circumstances, could only have served to further humiliate her. Fery's complaints, e-mails to Schoelzel's superiors, resistance to Schoelzel's decisions, and apparent refusal to accept the legitimacy of Schoelzel's decision making were a constant source of irritation to GGDC and IRMD managers and a disruptive influence in the workplace. After the cubicle blow up, Fery became a target for disciplinary isolation. And her immediate dissension with Harrison as her new supervisor sealed the deal for her disciplinary termination. Her employment relationship never improved after that time. Abolishing her position, or terminating her for

cause, were the only logical outcomes of an increasingly hostile working relationship between Fery and the new management team.

It is apparent that Fery did not work effectively with Schoelzel and Harrison given their personalities and style of management. From the time of Schoelzel's hiring to Fery's separation from employment, Fery questioned the way work was being managed. However, the State never provided Fery with notice of her rights regarding disciplinary removal, and it did not comply with the standards or procedures for a disciplinary removal.

Even though we conclude that the elimination of the Operations unit was part of a legitimate reorganization, the transfer of Fery to the customer relations' group under Harrison was, we believe, intended to precipitate Fery's constructive and voluntary quitting. Her experience and expertise, and Harrison's earlier removal from supervision because of his inability to get along with employees, including his then-supervisor Debra Fery, seems at odds with his promotion over Fery.⁴³

In *Knutzen*, we concluded on remand that removal for a legitimate reorganization is "for cause" and therefore not a violation of ORS 240.570(3). However, in *Knutzen*, we looked at the evidence on that record to determine the employer's motivation for divergence from its rules in implementing a layoff. In that case, we concluded that the motivation for the layoff or termination was a sincere belief that the rules did not apply, and we concluded that the employer had acted in good faith. In the case at hand, the weight of the evidence in this record shows that the employer did not act in good faith in removing Fery from management service.

c. Elimination of Fery's SLA specialist position

We turn to Fery's layoff: was Fery's layoff from the SLA specialist position part of a legitimate reorganization, or was it a disciplinary action based on her conduct?

There is no colorable dispute over the financial crisis at GGDC and IRMD. But it is not clear from this record how many positions were ultimately eliminated in the GGDC unit other than Fery's and the retiring Davison's which were abolished in the reclassification package. What is clear is that the reclassification package actually added more than \$17,000

⁴³Removal of Fery's supervisory duties was not technically a demotion in that she continued to receive the same rate of pay and was not removed from management service at that time. She did not appeal, and we do not review the change in her work assignment here other than as collateral evidence of the lack of good faith in her later termination.

per month to the payroll. This leads us to doubt the credibility of the State's assertion that Fery was eliminated as part of a larger cost-saving plan.

Stripping Fery of her supervisory role because of her behavior at the July 30 meeting was motivated by a belief that Fery's behavior was inconsistent with supervisor status. That was a disciplinary purpose and everything that followed was built on that discipline. In addition, Schoelzel informed Fery in front of coworkers that she would lose her cubicle, the most visible indicia of supervisor status. Fery was singled out and unique in her lack of access to the mainframe computer, machine room, and reduced access to the GGDC office. The July 30 changes in Fery's situation, along with the lack of any managerial explanation for the changes, resulted in a staff shunning of her that must have been obvious to every GGDC employee. Some staff observed Harrison expressing amusement at Fery's situation. One employee testified that in her 23 years in state government, she had never seen anything like the treatment Fery received. Moreover, immediately upon her return, Freese reacted to reports about the coffee meeting by suggesting that Fery be terminated.

Other factors also suggest that Fery's removal four months after the reorganization was disciplinary in nature. The narrow focus of her SLA specialist position appears to have resulted from a disciplinary intent—Schoelzel decided to remove Fery's supervisory authority after her behavior at the meeting announcing the cubicle move. The organizational chart distributed August 5 seems to have no reasonable place for Fery to exercise supervision in any event, which suggests that the chart itself was changed after Fery's outburst, because an August 9 GGDC Summer 2002 Strategy Planning document (prepared before the cubicle move meeting) for GGDC lists Fery as a manager. Including Fery as a supervisor was apparently the plan before the cubicle move outburst.⁴⁴ Removal of Fery's supervisory duties do not appear to be for operational reasons but rather as discipline for Fery's reaction to the cubicle move.

Once in her new position, Fery, who was generally acknowledged to be familiar with a wide range of GGDC processes, was sharply criticized when she assisted two other staff with an issue outside the narrow focus of the SLA specialist position. Other work Fery had done was ignored and assigned to other staff as if it had never been performed. It does not appear that anyone ever sat down with Fery and began a documented process of articulating clear, reasonable expectations about her behavior in the workplace and imposing discipline whenever those expectations were not met. Instead, GGDC management often ignored her complaints. Finally, Fery was the only one of the 320 employees in IRMD/P&D/GGDC who was involuntarily terminated.

⁴⁴GGDC did not present a draft of an organizational chart prepared for the cubicle-move meeting at hearing.

In addition to reorganization, ORS 240.570(2) permits removal from management service for lack of work. Given Fery's broad familiarity with, and expertise in, the wide range of functions GGDC performs, and the chronic lack of adequate staffing in the agency, we cannot conclude that there was a lack of work for Fery. Harrison, Fery's supervisor, admitted it. In his e-mail to Korson on October 31, he states that Fery did have work to do, but complained that she was being obstructive about performing it. Not surprisingly, instead of recommending discipline, Harrison recommended abolition of her position. Management apparently saw abolishing the position as a streamlined way to avoid the work of progressive discipline and establishing a good-faith cause for removal. The October 31 document is Harrison's only apparent written contribution to the budget process—all the other documents in the record are authored by higher level managers Schoelzel and Freese, and IRMD and DAS budget officials. We also note that Harrison acted as a gatekeeper for Fery's work, and chose to spoon feed the SLAs to her rather than assign them to her en masse. Harrison sent other SLAs to other GGDC staff to complete during this time (Fery was, however, on leave part of this time).

Based on the weight of the evidence, we conclude that the State did not remove Fery from management service due to a reorganization or lack of work. The State's removal of Fery under ORS 240.570(3) was therefore unlawful.

d. Possible Mixed Motives

We have concluded that the State removed Fery from management service for disciplinary reasons without following the procedures or standards that govern such removals. But even if the State acted in part because of a reorganization, the outcome would not change. We would be presented with "mixed-motive" case—that is, a situation where the State acted partly for disciplinary reasons under ORS 240.570(3), and partly to reorganize its workforce under ORS 240.570(2).

We have not found, and the parties have not cited, a case where we discuss mixed-motive removals under the State Personnel Relations Law. Under that law, disciplinary removals have different procedures and standards than removals due to a reorganization. We could conceivably require the employer to comply with both sets of procedures and standards. That, however, would be unduly burdensome to the employer and would create more confusion and uncertainty than it would resolve.

We instead adopt the "but for" standard used in mixed-motive cases in other areas of labor and employment law. See *Hardie v. Legacy Health System*, 167 Or App 425, 433-435, 6 P3d 531 (2000), *rev den* 332 Or 656, 36 P3d 973 (2001) (discussing mixed motive cases and the "but for" test in discrimination cases under ORS chapter 659); and

Oregon AFSCME Council 75, Local 3742 v. Umatilla County, Case No. UP-18-03, 20 PECBR 733, 740-741 (2004) (discussing mixed motives and the “but for” test under the Public Employee Collective Bargaining Act). Under this test, we determine whether an employee would not have been terminated “but for” a particular reason. Stated differently, we ask whether a particular reason “was a sufficient factor to attribute the decision to it.” *Portland Association of Teachers v. Multnomah County School District No. 1*, 171 Or App 616, 639, 16 P3d 1189 (2000).

Here, it is clear that the employer acted, at least in part, for disciplinary reasons. Freese admitted in his testimony that Fery was on both a disciplinary track and a reorganization track. The issue, then, is whether Fery would have been removed from management service even in the absence of the disciplinary motives. For all of the reasons discussed above, we find that discipline was the “but for” cause for Fery’s removal. The State failed to follow the procedures and meet the standards for a disciplinary removal.

e. Conclusion

The State asserts that it removed Fery as part of a reorganization, as authorized in ORS 240.570(2)⁴⁵. At the end of the day, based on the facts in this record, we find that Fery established that the decision to remove her was not part of the legitimate reorganization of GGDC and was made in bad faith. We will order Fery’s immediate reinstatement to an executive/manager E position and order that she be made whole for her losses in pay and benefits. ORS 240.560(4)⁴⁶.

⁴⁵The dissent wrongly relies on *McGee v. Department of Human Services*, MA-5-02 (March, 2003), *reversed in part and remanded*, 195 Or App 736, 99 P3d 337 (2004) in arguing that the State removed Fery for the good of the service.

ORS 240.570(2) provides for several employment actions that may affect managers, and it states three distinct standards for those actions. Under the law, the appointing authority may “assign, reassign and transfer management service employees for the good of the service and may *remove such employees from the management service due to reorganization or lack of work.*” (emphasis added.)

The State claimed that it removed Fery because of a reorganization or lack of work but the evidence does not support this claim. Fery was not reassigned or transferred for the good of the service, nor did the State argue this, because that is not the standard that the law applies to removals from management service. *McGee* does not apply.

⁴⁶*See Bellish v. State of Oregon*, Case No. MA-23-03, (June 2004) (Order on Reconsideration) where the State argued that it could not return the employee to his former position as directed under ORS 240.560(4) because the position no longer existed. There, we ordered that the employee be returned to his
(continued...)

ORDER

Fery will be immediately reinstated to an IRMD principal executive/manager E position in Salem, Oregon, and made whole for full back pay and benefits from the day she was discharged. The back pay and benefits shall be offset by any earnings and benefits Fery received from other employment, including unemployment compensation, since the date of her termination.

SIGNED and ISSUED this 31 day of October 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member

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James W. Kasameyer, Board Member

*Board Member Kasameyer Dissenting:

I dissent. Insofar as the majority departs from the Recommended Findings of Fact contained in the Proposed Order, I would adopt the facts found by the ALJ. I also dissent from the result reached by the majority, and would dismiss Fery's appeal for reasons set out more fully below.

The majority has determined that there was a legitimate reorganization but that management animosity lead to Fery's subsequent termination for personal disciplinary reasons. This conclusion is incorrect. In reaching it, the majority applies a mixed-motive test

⁴⁶(... continued)

former position because the abolishment of the position took place after the employee filed an appeal and appeared to be a sham rather than part of a legitimate reorganization. In the case at hand, the modification of Fery's work assignment may have been part of a reorganization. But the motive to terminate Fery from state service was disciplinary and not related to the reorganization. As to the termination, the State failed to carry the burden of proof to show that the termination was part of the legitimate reorganization. OAR 115-45-030(6). Had the State eliminated Fery's position and terminated her in August, we might be looking at a different case. However, she was kept on as an employee and then disciplined and terminated well after the organizational changes.

which goes beyond the proper standard of review under ORS 243.570(2). For reasons set forth below, I would dismiss this appeal.

Standard of Review:

This case is not before us on appeal from disciplinary action taken against Fery. Under ORS 240.570(3), discipline of a management service employee is authorized if the employee is “unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” Instead, Fery contests her layoff as improper under ORS 240.570(2), which provides that “An appointing authority may assign, reassign and transfer management service employees for the good of the service and may remove such employees from the management service due to reorganization or lack of work.”

This subsection has been interpreted in a number of cases by this Board and the Court of Appeals. The current standard for review of State personnel actions involving management service employees was set forth in our order on remand in *Knutzen v. Department of Insurance and Finance*, Case No. MA-13-92 (May 1993), *reconsidered* (June 1993), *reversed and remanded on other grounds* 129 Or App 565, 879 P2d 1335 (1994), *order on remand* (November 1994). Knutzen had been laid off as a result of an agency reorganization. However, the agency failed to follow its own rules in the process, and so we upheld the appeal. The Court of Appeals reversed on the basis that we had not used the proper standard of review. The Court held that State personnel actions should be reviewed using the “good faith for cause” standard previously used only in cases involving discipline or discharge of classified employees.

In our decision on remand, the Board strongly disagreed with the Court’s conclusion that a disciplinary standard intended for classified employees ought to be grafted onto existing statutory standards for appeals from personnel actions affecting management service employees. One of the great problems with the Court’s standard, according to the Board, was that “good faith for cause” carried with it the meaning which it had been given in private and public sector disciplinary cases over many years. Moreover, this meaning was not consistent with the text of ORS 240.570. We harmonized the Court’s standard with the words of the statute by redefining, and essentially ignoring, “good faith for cause.” As to disciplinary actions, we would continue to use our previous standard of review. We stated “the cause necessary to support discipline or removal of a management service employee under ORS 240.570(3)—“unable or unwilling to fully or faithfully perform satisfactorily”—was less in magnitude than that required to support the same discipline of a classified employee” (Slip Op, at 7).

The same was to be true of nondisciplinary personnel actions. We stated that *Moisant v. Children's Services Division*, Case No. MA-16-86 (December 1987), and cases expressing similar rationale will continue to govern our review of nondisciplinary personnel actions under ORS 240.570(2). The "good of the service" standard for assignment, reassignment, and transfer actions will continue to be construed to mean some reasonable basis in fact, *i.e.*, some rational basis or rational relationship to the agency mission. As we have often repeated, we are not authorized to do equity or second-guess the efficacy of employer decisions. The legislature 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." (*Downs v. Children's Services Division*, Case No. MA-12-90 (January 1992), *AWOP*, 115 Or App 748 (1992)).

Finally, we held that "We have no jurisdiction to review management service personnel actions not enumerated in ORS 240.570." On this basis, we dismissed the appeal. *Knutzen's* layoff was "for cause" since it was the result of a reorganization. Since the agency was not aware it was violating its own rules, we held that "bad faith" was not present.

As will be seen, our decision in *Knutzen* was consistent with past precedent and has been followed in all later cases involving management service employees—except this one.¹ In no case—except this one—have we found "bad faith" sufficient to justify reinstatement, notwithstanding that the assignment, reassignment, or transfer was for the good of the service, or that removal from management service was in fact for lack of work or as a result of reorganization. In no case—except this one—have we applied a "mixed motive" test taken from unfair labor practice cases to a nondisciplinary removal from management service.

Discussion:

In our most recent decision, *Hauck v. Department of Housing and Community Services*, MA-1-03 (December 2003), Hauck alleged that Housing and Community Services ISD removed him from management service in bad faith, under cover of a contrived reorganization which eliminated only one position, his. Hauck further argued that management based its decision to get rid of him on dissatisfaction with his performance as a supervisor that he had not been furnished with prior notice of the reorganization, and that a formal reorganization plan was never prepared.

We dismissed his appeal. In upholding the State, we first quoted ORS 240.570(2), which states that "the appointing authority may assign, reassign and transfer

¹I respectfully disagree with my colleagues on this point.

management employees for the good of the service, and may remove such employees from the management service due to reorganization or lack of work.” We then cited *Rosevear* and *Tetzlaff*, of which more below, for the proposition that Hauck had the burden of proof, and that our review of reorganization decisions is deferential: we are not authorized to do equity or second-guess the efficacy of employer decisions

This Board held that the reorganization was not a sham because the duties of other positions were changed. It did not matter that only Hauck was removed from management service. Though the record established that there was dissatisfaction with Hauck’s performance that there was no written reorganization plan and no advance notice to Hauck, this was insufficient to show bad faith. We concluded that it was not unreasonable for the Department to perceive that there was a need for reorganization, nor was it unreasonable to collapse one layer of management and distribute Hauck’s duties to his superior and lead worker subordinates. We held that a written reorganization plan is not necessary, and that prior notice of the reorganization was not required to show good faith.

As in *Hauck*, so here. The reorganization that eliminated the Operations unit from IRMD and all supervisory authority from Fery was legitimate. Once Fery exercised no supervisory authority, it was not appropriate to keep her in management service. The elimination of her position was rationally related to the mission of the agency, and was hence “for the good of the service.” Finally, under *Knutzen*, we do not have jurisdiction to review management service personnel actions not enumerated in ORS 240.570. Thus, we do not have jurisdiction to review Fery’s allegations concerning allegedly disciplinary aspects of her removal from management service. Hence, the majority’s “mixed motive” analysis is simply inapplicable to this case.

This point deserves further discussion. The majority first asserts that removal of supervisory authority from Fery “was part of the disciplinary actions imposed on Fery after the July 30 meeting. As pertains to Fery, the reorganization efforts became increasingly harsh and personal after that date.” The majority then continues listing alleged disciplinary actions taken against Fery, including: being singled out for demeaning treatment, excluded from management team decisions, and reassigned to an unfavorable cubicle without notice; assigned a supervisor who was also a former subordinate, denied access to computer functions, and excluded from the vitality of the division’s work. In addition, management allegedly encouraged “mobbing” behavior by Fery’s coworkers, whatever significance that has. In addition, management had given thought to terminating Fery.

The fact is, Fery was not demoted—as the majority opinion elsewhere acknowledges. She received three reprimands, and no other discipline. She did not appeal the reprimands. She did not appeal any of the adverse actions to the Employment Relations

Board (ERB), including “mobbing” or “incitement to mob.” Had she done so, her appeals would have been dismissed for lack of jurisdiction, as none of the adverse management personnel actions are enumerated in ORS 240.570. *Knutzen*.

We could not have reinstated Fery in a disciplinary appeal involving the same facts as the present case. It escapes me how we can reinstate her via the nondisciplinary appeal procedures in this case.

Even if we did have jurisdiction to consider Fery’s allegations, and they were proven, still a finding of “bad faith” is inappropriate here. The majority does not correctly analyze what constitutes “bad faith” in the context of a reassignment or reorganization. This is not an easy task.

We first look to context. It is not the equivalent of “bad faith” as applied to review of disciplinary actions involving classified employees. *Knutzen*. Nor is it the standard by which ERB reviews discipline of management service employees, for that is “unable or unwilling to fully or faithfully perform satisfactorily”—a lower standard than “good faith for cause.” (The majority insists that this is really a disciplinary removal. Even if this is true, we cannot apply a higher standard of review here than we would in a disciplinary appeal.)

Finally, it is not the equivalent of “unfair” or “inequitable.” As ERB has often repeated, we are not authorized to do equity or second-guess the efficacy of employer decisions. Yet that is precisely what the majority does: second-guesses management decisions regarding Fery in order to do what the majority perceive is equity. So what is “bad faith?” ERB has never found bad faith in a case similar to Fery’s.

In *Rosevear/Tetzlaff*, appellants attempted to raise “bad faith” issues in their appeals regarding their removal from management service and salary reductions. The agency argued that the removals resulted from a reorganization. It had created a new management service position, for which appellants unsuccessfully applied. The successful applicants came from outside the agency. Thereafter, appellants were reclassified downward, into classified positions, with a concomitant reduction in salary. Appellants alleged that their supervisor had made false statements to them, had misrepresented their qualifications, did not provide them an impartial eligibility review, and in fact personally recruited competitors from outside the agency. We declined to address appellants’ “bad faith” issues, holding that the reorganization was reasonably related to agency objectives. Regarding the salary reduction issues, we merely observed that the salary range for the reclassified position was appropriate.

Dalrymple v. Department of Transportation, Case Nos. MA-20-89, MA-3-90 (December 1990), also involved an appeal from a reassignment and later removal from

management service. Dalrymple had been employed in Information Services for ODOT. Due to a reorganization, he and his staff were to be assigned to the Highway Division. However, while the Highway Division was happy to take his staff, they did not want him. His supervisor wanted to keep a good customer happy. He did not reassign Dalrymple to the Highway Division, but rather reassigned him to a position in Information Services which had no supervisory duties. Dalrymple retained his management service classification and salary for a time, but thereafter his position was reclassified and returned to classified service, at a much lower salary range.

Dalrymple alleged that he was reassigned in retaliation for his whistle blowing activities, and his removal from management service was really a disciplinary demotion and therefore illegal. We held that his reassignment was the result of a legitimate reorganization and was reasonably related to the agency's mission. We agreed that it was important for his employer to keep a good customer satisfied. Thereafter, Dalrymple's removal from management service was also appropriate, since he was no longer performing supervisory duties after his reassignment. We found no evidence that management had been aware of his whistle blowing activities.²

In prior cases, we have not considered fairness and equity in reviewing nondisciplinary removals from management service. In *Ron Rawls, et al, v. Secretary of State*, MA-8-94 (November 1994), Mr. Rawls and others contested their removal from management service on the basis that the agency action was arbitrary and contrary to law. The agency argued that the removal from management service occurred as a result of a reorganization. We upheld the agency's action.

Rawls and seven others had been classified as Audit Managers. The agency eliminated this classification, based upon management perception that the audit managers performed work similar to senior auditors, a classified position. The agency established one new management service classification, audit supervisor, to be filled by four former audit managers, and reclassified the other four former audit managers as senior auditors. The new audit supervisors had additional duties.

²While these matters were pending, ODOT imposed a salary reduction on Dalrymple, based upon his failure to accept a work assignment with alacrity and his sudden and unexcused departure from a staff meeting. Dalrymple appealed this action to ERB, and his appeal was held in abeyance pending the result of the above cited decision. In *Dalrymple v. Department of Transportation*, MA-11-89 (December 1990), we upheld the discipline. We concluded that the first offence amounted to unwillingness to perform the duties of his position and that the second offence amounted to insubordination. Dalrymple's conduct was similar to but much less offensive than Fery's.

After reclassification, Rawls and his fellow appellants continued to perform the same work which they had done as audit managers, at a substantial reduction in pay. The former audit manager position was paid at range 32, while the senior auditor position was at range 27. Appellants argued that there had been no reorganization as to them, because there had been no essential change in their job duties. We held that a reorganization had taken place and their reclassification was a result of that reorganization. It was enough that other employees' duties had been changed.

We stated that 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 pursuit of agency objectives. We then ruled that the agency had a rational basis for setting the salary for the senior auditor position at range 27, and dismissed the appeal.

Needless to say, it is difficult to reconcile the majority's decision here with any of these cases. Hauck alleged that his removal from management service was taken in bad faith since only his position was eliminated—and for a disciplinary purpose. Both were established on the record. We ignored this and concentrated on the question of whether there was a reasonable basis for the employer's actions—as we are required to do under *Knutzen*, and its progeny.

Indeed, as our past decisions show, we consistently defer to employer actions and give short shrift to claims of bad faith and arbitrary conduct. Yet, while the majority find the reorganization to be legitimate, they would reinstate Fery based upon what the majority characterize as harsh and improper acts of discipline taken against her. These actions include changing her cubicle assignments, removal of her computer access, reassignment to serve under Harrison, and other indignities—which, it is alleged, amount to a bad faith termination apart from a legitimate reorganization. This analysis is not permissible under *Hauck*. It is also factually incorrect. None of these actions are disciplinary in nature, as that term is used in ORS 240.570(3).

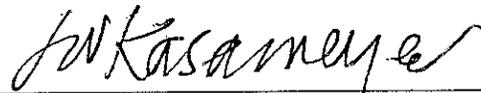
Finally, the majority's consideration of the agency's motivation and its characterization of Fery's layoff as a bad faith termination is precluded by the recent decision of the Court of Appeals in *McGee v. Department of Human Services*, MA-5-02 (March 2003), *reversed in part and remanded*, 195 Or App 736, 99 P3d 337 (2004). In *McGee*, the Department disciplined and involuntarily transferred McGee for his lack of candor, his secrecy, and his failure to advise his superior of relationships which could expose the Department to potential liability—all of which caused his supervisor to lose trust and confidence in McGee's judgment and in his ability to advise personnel. McGee appealed both the discipline and the transfer.

This Board overturned both the discipline and the transfer. As far as the transfer was concerned, although we acknowledged the standard set forth in ORS 240.570(2), we concluded that the transfer was not “for the good of the service,” but was disciplinary in nature. In so deciding, we relied on the fact that the Department relied on the same set of facts for both the disciplinary action and the transfer. The Department appealed.

The Court of Appeals affirmed our decision regarding the disciplinary action, but reversed our ruling regarding the transfer and remanded the case for reconsideration.³ The Court specifically rejected our reasoning that “[T]here is no reasonable characterization of reassignment other than that it was disciplinary. [The Department] acted for the same reasons and on the same facts as it used to support the reprimand.” (Slip Op, at 3.) Instead, the Court held that an employee could be disciplined under subsection (3) and transferred under subsection (2) for the same conduct. According to the Court:

“[T]he 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 this 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) to assess additionally whether the department’s action resulted in a reassignment that was for “the good of the service.” (Slip op, p. 3.)

Just as this Board did in *McGee*, the majority here has treated a nondisciplinary layoff due to a reorganization or lack of work as covert disciplinary action, based upon what it characterizes as the agency’s improper disciplinary motivation. This reliance on employer motivation is precluded by the *McGee* decision. This being the case, this Board should have sustained Fery’s layoff and dismissed her appeal.



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

³Our decision on remand is being issued on this same date, October 31, 2005.

