BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

FRANK DE LIBERO, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	Case No. RIF-00-0006 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on March 20, 2001.

1.2 **Appearances.** Appellant Frank de Libero was present and was represented by Michael Hanbey, Attorney at Law, of Ditlevson, Rodger, Hanbey & Dixon, P.S. Janetta Sheehan, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a reduction-in-force (RIF) action based on a good faith reorganization for efficiency purposes.

1.4 **Citations Discussed.** WAC 358-30-170; WAC 356-56-550; O'Gorman v. Central Washington University, PAB No. L93-018 (1995); Talbott and Hobson v. Dep't of Social and

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Health Services, PAB Case Nos. L81-2 & L81-3 (Murphy, Hrgs, Exam.)(1981); George v. Dep't of Agriculture, PAB No L94-026 (1996) Amundsen v. Dep't of Labor and Industries, PAB Case No. L85-1 (1985), aff'd (Thurston Co. Super. Ct. No. 85-2-02185-9 (1987).

II. FINDINGS OF FACT

2.1 Appellant Frank de Libero was a Washington Management Service (WMS) employee for the Department of Social and Health Services in the Office of Forecast and Policy Analysis of the Budget Division. Appellant was a permanent employee. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 31, 2000.

2.2 Appellant began his state employment in 1978, and he began working for the Department of Social and Health Services in 1994.

2.3 Stan Marshburn became the Director for the Budget Division in November 1998. Mr. Marshburn reviewed the office structure of the Forecasting office which consisted of nine employees: the Office chief; two Unit Managers; and six Forecast Analysts. Each Unit Manager supervised one subordinate employee. The Unit Managers and Forecast Analysts reported directly to the Office Chief. Appellant and Mark Terjerson were the employees filling the two Unit Manager positions.

2.4 In Mr. Marshburn's opinion, the additional layer of supervision, which entailed a one-to-one reporting relationship, was inefficient and unnecessary. However, while Mr. Marshburn did not believe that the Unit Managers were critical positions in the unit, he identified a need for a position to perform critical duties in communicating the division's need for financial resources and communicating the division's use of its funding and budget. Mr. Marshburn began to consider

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creating a new WMS position entitled Communications Manager to perform these types of responsibilities.

2.5 In January 1999, Appellant was placed in a rotational assignment with the Office of Research and Data Analysis.

2.6 In June 1999, Appellant returned to his position in the Forecast Office. Mr. Marshburn assigned Appellant different responsibilities and he eliminated Appellant's supervisory responsibility.

2.7 On September 17, 1999, Appellant began working in another rotational position for a Fraud and Abuse Detection project.

2.8 In the latter part of 1999, Mr. Terjeson, accepted a job elsewhere and left the Forecast unit. Mr. Marshburn did not fill his Unit Manager position. After Mr. Terjerson's departure and while Appellant was on his rotational assignment, Mr. Marshburn observed that the Forecast office continued to operated effectively, which confirmed his belief that the Forecast Unit should be reorganized and the two Unit Manager positions eliminated.

2.9 On December 1, 1999, Appellant returned to the Forecast unit and he, Mr. Marshburn and Reggie Taschereau, Human Resource Manager, met to discuss Appellant's new work responsibilities. During this meeting, Mr. Marshburn notified Appellant that he was going to begin the process of eliminating his Unit Manager position. Mr. Marshburn also informed Appellant of his intent to create the Communications Specialist position, which reported directly to Mr. Marshburn. Appellant's new duties were related the Communications Specialist position.

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2.10 In December 1999, Mr. Marshburn abolished the Unit Manager position previously held by Mr. Terjeson, and he began the formal RIF process to also eliminate Appellant's Unit Manager position.

2.11 By letter dated December 6, 1999, Mr. Marshburn informed Bob Conner, Acting Director for Employee Services, of the need to eliminate Appellant's position due to a good faith reorganization for efficiency purposes.

2.12 Kathy Virnig, the agency's Reduction in Force Coordinator, was responsible for determining Appellant's RIF options. On January 25, 2000, a memo was issued to all DSHS Assistant Secretaries informing them of the need to RIF a WMS employee. Attached to the memo was a list of potential position options identified within each of the administrations, Appellant's job application, and a job description of the WMS position held by Appellant. The Assistant Secretaries were asked to review the options listed and determine whether Appellant qualified for any of the positions identified based on the information provided.

2.13 In response, the Budget Division identified two positions as potential options. The Communication Specialist position was one of the two positions identified. The Legislative Relations division also identified several potential options. After receiving the responses, Ms. Vernig evaluated the positions identified and their minimum requirements to Appellant's work history, knowledge, skills and experience.

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2.14 In determining RIF options for a WMS employee, Ms. Vernig evaluates the salary ranges of the positions identified to ensure that options offered are at the employee's current salary or as close to it as possible. Ms. Vernig also considers vacant positions versus filled positions to avoid bumping another employee.

2.15 In evaluating Appellant's options, Ms. Vernig eliminated the options identified by Legislative Relations and one of the options identified by the Budget Division because they failed to meet the minimum salary criteria or because Appellant's qualifications were not commensurate with the requirements of the position. Ms. Vernig ultimately identified the Communication Specialist position in the Budget Division as Appellant's option because it met the higher salary standard and was vacant.

2.16 By letter dated February 16, 2000, Stan Marshburn, Director for the Budget Division, informed Appellant that due to a good faith reorganization for efficiency purposes, his WMS Unit Manager position would be abolished at the close of business on March 3, 2000. Appellant was offered a position as a Communications Specialist within the Budget Division as his formal RIF option. On February 24, 2000, Appellant declined to accept the offer.

2.17 Respondent has adopted a reduction in force policy. DSHS Operating Procedures, WMS Procedure No. 4.01, contains the agency's reduction in force policy for WMS positions. The policy indicates that the layoff unit in WMS is the administration in which the position being RIF'd is located and where the search for WMS RIF options is conducted. In summary, the policy requires the appointing authority to advise the affected employee of the intent to eliminate his/her position; determine the RIF options; and send written notification thereof. The procedure for determining RIF options is as follows:

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> Beginning with the current management band and below, option to WMS position will be determined by the Assistant Secretary or designee. ... Options will be offered based on seniority, and will be identified sequentially as follows:
>
> 1) A vacant position within the layoff unit that is at the employee's same level of responsibility and duties for which the employee possesses the required job skills.
>
> b) If no options under (1), a vacant/filled WMS position within the layoff unit at the same salary and management band, and the same or progressively lower level responsibilities and duties for which the employee has the required job skills and applicable personal work history.
>
> ....

2.18 Respondent's WMS Procedure No. 4.01 also indicates that an Employee Job Skills Inventory check list and a Management Job Skills Assessment form shall be completed for the employee. However, these forms were not completed in this case.

2.19 Appellant testified that he and the Forecast Office Chief were involved in a romantic relationship which created conflict between the two of them when they ended their relationship. Appellant testified that he subsequently reported to Mr. Marshburn the allegations that the Office Chief was harassing him, but that Mr. Marshburn refused to conduct an investigation.

III. MOTION

3.1 At the conclusion of Respondent's case, Appellant made an oral motion to set aside the reduction in force action. Appellant argued that Respondent failed to follow its own policies and procedures. Appellant argued that Respondent failed to follow Policy 534 and failed to follow the procedures outlined in WMS Procedure 4.01 by failing to provide him with a RIF employment job skills inventory and a management job skills assessment form. Appellant further argued that

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Respondent failed to demonstrate that it considered positions with higher level responsibilities and duties when evaluating his RIF options.

3.2 Respondent argued the WMS procedures were in the process of being changed, but asserts that the agency followed the WACs and laws and, therefore, followed the appropriate procedures. Respondent argued that Appellant was in a WMS position and that the agency was not required to follow Personnel Policy 534 which outlines the RIF procedures for general government employees. Respondent argues that changes occurring in WMS Procedure 4.01 resulted in additional options for Appellant which he previously would not have been entitled to receive. Respondent argues that there is no basis to set aside an action even when there is a showing that an agency failed to follow its own policies and procedures. Respondent argued that there was sufficient information for the Board to go forward with the appeal.

3.3 The Board considered the arguments and denied Appellant's motion.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that it has proven by a preponderance of the credible evidence that Appellant's position was RIF'd due to a good faith reorganization for efficiency purposes. Respondent argues that management has the authority to review its operations and reorganize and to eliminate positions as it deems appropriate. Respondent argues that Mr. Marshburn determined that the Forecast Unit did not need an additional layer of supervisors and that for efficiency purposes, he identified the need to abolish Appellant's Unit Manager position. Respondent argues that Mr. Marshburn identified the need for a Communication Specialist position to convey the division's budgetary programs, budgetary needs and use of funds. Respondent argues that Mr. Marshburn created the position which remained vacant so it could be offered as an option to Appellant. Respondent denies that there was a conspiracy to "get rid" of Appellant.

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4.2 Appellant argues that his RIF was a deliberate effort to remove him from his job, was motivated by personal reasons, and was done in bad faith rather than for efficiency purposes. Appellant asserts that he was assigned to work on project positions after he filed a complaint of harassment against his supervisor, the Office Chief. Appellant argues that his RIF actually began in early 1999 when he was reassigned to work in those other departments. Appellant also argues that the RIF resulted from the appointing authority's concerns with budget and funding issues, rather than reorganization issues. Appellant argues that the agency's policy and procedures are not fair, and he further argues that the RIF became effective when he was just two and one half months short of retirement. Appellant argues that Respondent failed to establish that his RIF was the result of a good faith reorganization or that they offered him the proper options.

V. CONCLUSIONS OF LAW

5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

5.2 In an appeal of a reduction-in-force, Respondent has the burden of proof. WAC 358-30-170. Respondent has the burden of proving by a preponderance of the credible evidence that it laid the employee off for the reason stated in the RIF letter. O'Gorman v. Central Washington University, PAB No. L93-018 (1995).

5.3 In Talbott and Hobson v. Dep't of Social and Health Services, PAB Case Nos. L81-2 & L81-3 (Murphy, Hrgs, Exam.)(1981), the hearings examiner found that the reorganization was effected after consideration of many factors affecting the efficiency of the overall unit, and not designed to inconvenience the two appellants whose positions were transferred as a result of the reorganization and consolidation.

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5.4 It is not our function to determine whether the reorganization proposal itself was right or wrong, but only to determine if the reorganization was done in good faith. George v. Dep't of Agriculture, PAB No L94-026 (1996).

5.5 In Amundsen v. Dep't of Labor and Industries, PAB Case No. L85-1 (1985), aff'd (Thurston Co. Super. Ct. No. 85-2-02185-9 (1987), the appointing authority determined, upon the recommendation of an assistant, that to accomplish the revised goals of his administration, a position could be better used if it was reallocated to another class. The Board held that it is not the Board's function to probe the mental processes by which the decision was reached, nor to substitute its judgment for that of the agency when there is a showing of reasonable basis for such decision.

5.6 The first issue here is whether Respondent complied with WAC 356-56-550(1) when it laid off Appellant because of a good faith organization for efficiency purposes. WAC 356-56-550, which governs reduction in force procedures for WMS employees, indicates as follows:

> (1) Washington management service employees may be separated due to reduction in force in accordance with the statutes and the agency's reduction in force procedures . . . because of . . . good faith reorganization for efficiency purposes. . . .

5.7 In this case, Mr. Marshburn reasonably believed that the Unit Manager position and the additional layer of supervision created by the position was unnecessary. Respondent has met its burden of proof that Appellant's reduction in force was the result of a good faith reorganization for efficiency purposes and in compliance with the requirements of WAC 356-56-550.

5.8 The second issue presented is whether Respondent provided Appellant with appropriate layoff options. WAC 356-56-550, subsection (3) indicates:

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> Each agency shall develop a reduction in force procedure that is consistent with the following:
>
> . . . .
>
> (i) Appointing authorities will seek within the agency a funded vacant Washington management service position for which the employee has the required job skills, and that is at the same salary standard and/or same evaluation points.
>
> . . . The appointing authority will first look within the current management band for equivalent funded position at the same salary standard and/or the same evaluation points, and if none are found, then progressively to positions with a lower salary standard . . ..

5.9 Mr. Marshburn reasonably identified a need for and created a Communication Specialist position. During the RIF process, this position was identified as a viable option and was ultimately offered to Appellant. Although the agency's inventory and checklist forms were not completed during Appellant's RIF process, there was sufficient evidence to establish that Respondent correctly determined Appellant's layoff option as required by WAC 356-56-550.

5.10 Appellant makes numerous claims against Respondent, including that he was RIF'd with just two and one half months left toward retirement and that the RIF was motivated by a desire to remove him from the agency. However, there was insufficient evidence to establish his claim that Respondent misused the RIF procedures to remove him from the agency. In fact, Appellant was offered a layoff option within the Forecast unit, therefore, he did have an option for continued employment as a state employee.

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5.11 Respondent has met its burden of proof, and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Frank de Libero is denied.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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Leana D. Lamb, Member

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