

Elizabeth Lopez was terminated effective February 17, 2004. She filed a timely appeal on March 1, 2004, alleging that she was a management service employee who had been terminated without cause in violation of ORS 240.560. The ALJ bifurcated the case to hear the jurisdictional issues first.

The issue in this first portion of the bifurcated case is:

As of February 17, 2004, was Elizabeth Lopez' position with the Department of Human Services, Seniors and People with Disabilities (Department) in management service or unclassified service?

The ALJ recommended dismissal of the appeal on grounds that Lopez was an unclassified employee over whom this Board lacked jurisdiction. We disagree. We conclude that Lopez was an employee in management service at the time of her termination, and that this Board has jurisdiction over her appeal. Accordingly, we remand the matter to the ALJ for further proceedings.

Having the full record before it, this Board makes the following:

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. Lopez worked for the Department of Human Resources' (DHS) Division of Adult and Family Services from 1990 through June 2001. In June 2001, Lopez left her management service job in DHS to take a position as district manager for Multnomah County's Aging and Disability Services Program.

2. In September 2001, Lopez was recruited by the Department for a position as a principal executive manager G (PEMG) in the Home and Community Supports Division of the Department. Lopez did not have to apply for the job to be considered. The job announcement stated, in part:

**** * *** This position is Executive Service not represented by a union.

****SPECIAL NOTE:** The anticipated level of this position is PEMG. However, as with all management positions

reporting directly to DHS assistant directors, the position will be subject to an upcoming review to determine the appropriate classification level in light of the recent reorganization. * * *” (Emphasis in original.)

3. The position description for the job had an “X” in the box next to the words “Executive Service.” It also had completed information in the box entitled “TO BE COMPLETED ONLY FOR POSITIONS IN MANAGEMENT SERVICE.” The line for “Employee Signature” is blank.

Lopez, who had never been in executive service before, accepted the position. On September 21, 2001, Lopez forwarded an e-mail from DHS Manager Tanya Colie McGee, to Lydia Lissman, assistant director of the Department. The message stated, in part, “Elizabeth Lopez has accepted a position on the Seniors and Persons with Disabilities Services (SPDS/DHS) Executive Team.”¹

4. On October 17, 2001, Debra McDermott sent a letter to Lopez. McDermott stated, in part:

“Congratulations on your appointment as Administrator of the Office of Employment and Financial Benefits.

“This letter serves to confirm your October 8, 2001 appointment to the Principal Executive/Manager F level, Executive Service, at a salary of \$6180. Due to an upcoming planned review of all upper level management positions in DHS, the classification level of your position is tentative.”

5. Because of the Department’s extensive reorganization, many positions in the Department were unfunded. Funding for these was supplied by placing two individuals under the same position number. Positions filled in this fashion are called “double-filled.” Lopez’ position was double-filled into a position in management service, as was that of Mary Lee Fay, another member of the SPDS/DHS executive team. Lopez was not notified that her position was a double-fill or that the Department intended it to be a temporary placement in management service.

¹The SPDS/DHS executive team was comprised of Lopez, Cathy Cooper, Mary Lee Fay, and Cindy Hannum. The members of the team generally referred to the team as the “executive team” or “executive staff.”

6. Lopez received personnel action forms and filled out time sheets from November 2001 through April 2002, which identified her position as "MMS X7010 A A MGTSVC SV PRIN EXEC/MANAGER F." The "X" in that position code, and the letters "MGTSVC," identify the position as belonging to management service. Some of those documents listed her "Employment Status" as "T," for trial service, a status which is not held by employees in executive service.

7. From April 2002 through February 2004, Lopez received personnel action forms and filled out time sheets which identified her position as "MESN Z7010 A A EXSVC SV PRIN EXEC/MANAGER F." The "Z" in that position code, and the letters "EXSVC," identify the position as one in executive service.²

8. On November 2, 2001, the Department issued an organization chart of the Department. Lopez' position was identified as having the same rank and classification as Cooper, Fay, and Hannum.

9. On November 22, 2002, the Department sent Lopez a letter. It stated that DHS management positions had been reviewed in light of the recent Department reorganization. The letter stated:

"The review of your current position resulted in the recommendation that it be allocated to a higher classification pending legislative review. * * * The recommended classification is:

"New Class Title: PRINCIPAL EXECUTIVE/MANAGER G
"New Class Number: X7012

²Lopez testified that she did not recall seeing some of these documents, and that she did not notice the executive service codes on the others. She recalled seeing her position description, but did not recall whether it identified her position as executive service.

Employees are notified of classification and other job changes through a personnel action form. These forms contain 28 lines, most with three or four information fields on each line. An asterisk indicates information that is changed from a prior form. Employees, including senior personnel in human resources, do not typically review all information on such a document, but focus primarily on changes. No document in the record contains an asterisk that would have directed Lopez' attention to the change from "X" to "Z," or from "MGTSVC" to "EXSVC."

“Effective 10/8/01, you will be paid work-out-of-class until your position is allocated to the new classification. * * *”³

10. Lopez’ work-out-of-class pay added more than \$300 per month to her salary.

11. During the period of her employment, Lopez had access to organizational charts and other information regarding her position in the Department. The organization charts identified the position as executive service. There is no evidence that Lopez ever saw this information. The three other Department employees at her level believed that their positions, as well as that of Lopez, were in executive service. Unlike Lopez, however, none of these other employees received documents that indicated they were in management service. Lopez did not ask any of her coworkers or any other Department employees to clarify whether her position was in executive service or management service.

12. On February 17, 2004, James Toews told Lopez that she was terminated.⁴ When Lopez asked why, Toews stated that it was not necessary to give a reason, because her position was in executive service. Lopez replied that she believed that she was in management service, and asked for documentation regarding when the position changed from management service to executive service.

13. On February 18, Lopez filed a claim for unemployment compensation benefits. The form contained the following question, which Lopez answered as indicated:

“[Q] Why were you discharged/fired? Please be as specific as possible. What did you do or fail to do that caused your discharge? What reason did your employer give you? Did you do what your employer claimed?”

“[A] Because I was an Executive Services employee my supervisor does not have to give cause to terminate. As an ‘At

³Lopez testified that she recalled reviewing this document, and that it confirmed her view that her position was management service.

⁴Lopez was given the options of termination, resignation, or a significant demotion. She chose termination.

Will' employee I was let go under DHS policy 40-[illegible]. My employer did not claim I did anything to cause my termination."⁵

CONCLUSIONS OF LAW

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

Lopez appeals to this Board, asserting that she was a management service employee who was terminated in violation of ORS 240.560. The State does not dispute the general proposition that this Board has jurisdiction over appeals concerning an employee's termination from management service. It contends, however, that Lopez was not a management service employee, but instead was in the executive service. The State correctly observes—and Appellant does not dispute—that this Board lacks jurisdiction over appeals from the termination of an executive service employee. *See* ORS 240.240 and 240.245; *Hanf v. Office of State Fire Marshall*, Case No. MA-21-96 (November 1996); and *Hunt v. Department of State Police*, Case No. MA-4-89 (June 1989).

The State asks us to dismiss Lopez' appeal for lack of jurisdiction. The lone issue in this bifurcated portion of the appeal is whether Lopez' position was in management service, in which case this Board has jurisdiction, or executive service, in which case this Board lacks jurisdiction and must dismiss this appeal.

For the reasons discussed below, we conclude that we have jurisdiction because Lopez is in management service. Accordingly, we remand the matter to the ALJ for further proceedings on the merits of the appeal.

As an initial matter, Lopez asserts that the State is equitably estopped from arguing that her position is in executive service. "The doctrine of equitable estoppel is employed to prevent a party from alleging a crucial fact to be other than what by act or omission that party previously led another party justifiably to believe." *In re Menard*, 180 Or App 181, 186, 42 P3d 359 (2002). The doctrine rests "upon principles of good faith and honesty and the notion that one should not be able to take advantage of the falsity of what he has led another to believe to be true." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 689, 669 P2d 1132 (1983). The doctrine applies to

⁵Lopez testified that she understood the question to request the reason given by the employer for the termination, and that is how she answered it. We do not consider this to be a waiver of her claim that she was a management service employee when she was terminated.

governmental bodies. An agency of government may be estopped from asserting a claim inconsistent with a position it previously took. *Department of Transportation v. Hewitt Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995).

The elements of equitable estoppel are (1) a false representation; (2) made with knowledge of the facts; (3) to a party who is ignorant of the truth; (4) with the intention that it be acted upon by the other party; and (5) the other party was induced to act upon it. *Day v. Advanced M&D Sales, Inc.*, 336 Or 511, 518-19, 86 P3d 678 (2004); see *Caserta v. Klamath County and Klamath County Peace Officers Association*, Case Nos. UP-139/140-93, 15 PECBR 864 (1995).

Here, there is no question that the State intended to double-fill Lopez in a management service position, and it provided Lopez with numerous official documents over an extended period of time that reasonably could have led her to believe she was in management service. For equitable estoppel to apply, however, the misrepresentation must be of a material fact, and not of a conclusion of law. *Day, supra*, 336 Or at 520.

In *Day*, the Supreme Court held that an employee who filed a workers' compensation claim was, at most, asserting his belief that he was entitled to benefits under the statute. The Court determined that this was an assertion of a legal conclusion rather than a representation of fact, and as such it could not form the grounds for equitable estoppel.

We reach a similar result here. A representation that an employee is in management service is a conclusion of law. See *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 619, 43 P3d 1106 (2002) (determination of a claimant's status as a "worker" under the workers' compensation statutes was a conclusion of law rather than a finding of fact). Such a representation cannot serve as the basis for equitable estoppel. We reject Appellant's request to apply the doctrine here.

We turn to the status of Lopez' position: was it in management service or executive service?

The State's arguments focus almost entirely on what the parties allegedly represented, knew, understood, or intended. These considerations may be relevant to the estoppel issue, but they do little to further the inquiry into Lopez' status under the law. We instead begin our analysis by looking to the statute.

ORS 240 195 divides all of state service into four categories: classified service, unclassified service, exempt service, and management service. Notably, the

statute does not mention “executive service,” the category in which the State asserts it placed Lopez. “Executive service” is a category created by administrative rule. OAR 105-10-000(24) defines “executive service” as “[p]art of the exempt or unclassified services as specified in HRSD State Policy 30.000.01, Position Management.”

To understand the rule, we must examine the policy referred to in the rule. The version of the policy in effect when Lopez was hired⁶ states in pertinent part:

“(1) **Policy:** State agencies shall manage work assignments within the budgeted position classification levels. Accordingly, an appointing authority shall:

“* * * * *

“(c) Determine and maintain accurate statutory assignment or representation identifications of each position to include:

“* * * * *

(B) Assignment to the executive service when a position is exempt or an unclassified administrative position as specified in ORS 240.200(1) and ORS 240.205(1), (2), (3), (4) and (5), or the position is designated as an administrator of an established division within the agency. **Positions identified as principal assistants, pursuant to ORS 240.205(4) and defined under Section (2)(b) of this policy, require the approval of the Director of the Department of Administrative Services to be placed in the unclassified executive service.”** State Policy 30 000.01 (2001), bold in original.

⁶The current version of the policy has some differences, but none that are pertinent here

The labyrinth thus leads us full circle back to the statute. Under the rule and policy, “executive service” is an amalgam of certain positions in the exempt service and the unclassified service. Specifically, the policy identifies ORS 240.200(1),⁷ which is 1 of the 6 subgroups of employees who comprise the exempt service, and ORS 240.205(1) to (5),⁸ which are 5 of the 16 subgroups of employees who comprise the unclassified service, as the components of the executive service.

⁷ORS 240.200 states:

“* * * The exempt service shall comprise:

“(1) Officers elected by popular vote and persons appointed to fill vacancies in elective offices.”

⁸ORS 240.205 states:

“* * * The unclassified service shall comprise:

“(1) One executive officer and one secretary for each board or commission, the members of which are elected officers or are appointed by the Governor.

“(2) The director of each department of state government, each full-time salaried head of a state agency required by law to be appointed by the Governor and each full-time salaried member of a board or commission required by law to be appointed by the Governor.

“(3) The administrator of each division within a department of state government required by law to be appointed by the director of the department with the approval of the Governor.

“(4) Principal assistants and deputies and one private secretary for each executive or administrative officer specified in ORS 240.200 (1) and in subsections (1) to (3) of this section. ‘Deputy’ means the deputy or deputies to an executive or administrative officer listed in subsections (1) to (3) of this section who is authorized to exercise that officer’s authority upon absence of the officer. ‘Principal assistant’ means a manager of a major agency organizational component who reports directly to an executive or administrative officer listed in subsections (1) to (3) of this section or deputy and who is designated as such by that executive or administrative officer with the approval of the Director of the Oregon Department of Administrative Services.

“(5) Employees in the Governor’s office and the principal assistant and private secretary in the Secretary of State’s division.”

The State asserts that Lopez is in executive service because her position falls within one of the subsections listed in the policy, *viz.*, ORS 240.205,⁹ which states:

“* * * The unclassified service shall comprise:

“* * * * *

“(4) Principal assistants and deputies and one private secretary for each executive or administrative officer specified in ORS 240.200 (1) and in subsections (1) to (3) of this section. ‘Deputy’ means the deputy or deputies to an executive or administrative officer listed in subsections (1) to (3) of this section who is authorized to exercise that officer’s authority upon absence of the officer. ‘Principal assistant’ means a manager of a major agency organizational component who reports directly to an executive or administrative officer listed in subsections (1) to (3) of this section or deputy and who is designated as such by that executive or administrative officer *with the approval of the Director of the Oregon Department of Administrative Services.*” (Emphasis added.)

To qualify under this subsection, the employee must be either a “deputy” or a “principal assistant” as those terms are defined. Lopez is not a “deputy.” She does not report directly to any of the listed executive or administrative officers, and there is no evidence that she exercises the officer’s authority when the officer is absent. Further, the organizational chart indicates that Lopez is at least one step below the level of deputy—she reports to Deputy Assistant Director James Toews.

The lone remaining possibility is that Lopez is a “principal assistant.” Under the statute, a principal assistant is an employee who (1) is a manager of a major

⁹The State does not—and could not credibly—assert that Lopez fits in any of the other listed subsections.

agency organizational component, (2) reports directly to a listed officer or a deputy, (3) is “designated as such” by the officer, and (4) has the designation approved by the Director of the Oregon Department of Administrative Services (Director). An employee must meet all of these requirements to be considered a “principal assistant.”

We need not decide whether Lopez meets the first three criteria because, as Lopez points out, even if we assume she was properly designated, there is no evidence in the record that the Director approved the designation.¹⁰

At the outset, we note that the statute is ambiguous. The last sentence in ORS 240.205(4) states: “‘Principal assistant’ means a manager of a major agency organizational component who reports directly to an executive or administrative officer listed in subsections (1) to (3) of this section or deputy and who is designated as such by that executive or administrative officer with the approval of the Director of the Oregon Department of Administrative Services.” In context, the phrase “designated as such” has an indefinite reference. That is, it is unclear whether the employee must be designated as “a manager of a major agency organizational component,” or instead, whether the employee must be designated as a “principal assistant.” We need not resolve this ambiguity here¹¹ because there is no evidence that the Director ever approved *any* designation for Lopez, either as the manager of a major agency organizational component, or as a principal assistant.

¹⁰We may not speculate about whether the Director gave the statutorily required approval. Our review is confined to the factual record which includes evidence developed by the parties at hearing, stipulations of the parties, and matters subject to official notice. *Arlington Education Association v. Arlington School District*, 177 Or App 658, 668-69, 34 P3d 1197 (2001), *rev den* 333 Or 399 42 P3d 1243, 1244 (2002). The State did not identify any evidence in the record of Director approval, and we found none.

¹¹We note that HRSD State Policy 30 000 01, *supra*, appears to resolve the ambiguity by requiring the Director to approve positions identified as principal assistants.

This is not a mere technicality. Approval of the designation by the Director is a statutory requirement. When construing a statute, we may not omit language that the legislature has included. ORS 174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). The evidence in this record fails to establish that Lopez has been properly approved by the Director, and she therefore does not meet all of the statutory requirements to be an unclassified executive service employee.¹²

It remains for us to determine which service category Lopez fits into. Under ORS 240.212, management service comprises all positions that are neither unclassified nor exempt, and that are either confidential, supervisory, or managerial as defined in ORS 243.650.

We have determined that Lopez' position is not in the classified or exempt service. The position description indicates that Lopez directly supervised 4 employees, and that she supervised 210 more through subordinate supervisors. It further indicates that the position required Lopez to plan, assign, and approve work; respond to grievances; discipline and reward employees; hire and fire (or effectively recommend such actions); and prepare and sign performance appraisals. These duties clearly qualify Lopez as a supervisory employee as defined in ORS 243.650(23).¹³ As such, she is a member of the management service.

¹²There is no evidence in this record that the Director has delegated this approval authority.

¹³ORS 243 650(23) states:

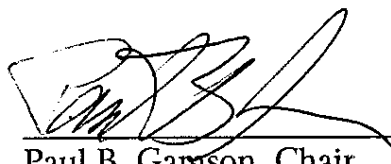
“Supervisory employee’ means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment. Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement shall not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation. Notwithstanding the provisions of this subsection, no nurse, charge nurse or similar nursing position shall be deemed to be supervisory unless such position has traditionally been classified as supervisory.”

We conclude on the record before us that Lopez was a management service employee. As such, this Board has jurisdiction over an appeal of her termination. We will remand the matter to the ALJ for further proceedings consistent with this order.

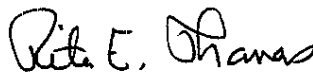
INTERIM ORDER

The matter is remanded to the ALJ for further proceedings consistent with this order.

DATED this 29th day of July 2005



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

