

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD OF  
THE STATE OF DELAWARE**

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| <b>DOROTHY PRIOR, Psy.D.,</b>              | ) |                             |
|  | ) |                             |
| Employee/Grievant,                         | ) |                             |
|  | ) | <b>DOCKET No. 20-10-787</b> |
| v.   | ) |                             |
|  | ) |                             |
| <b>DEPARTMENT OF HEALTH AND SOCIAL</b>     | ) |                             |
| <b>SERVICES, DIVISION OF DEVELOPMENTAL</b> | ) |                             |
| <b>DISABILITIES SERVICES,</b>              | ) | <b>DECISION AND ORDER</b>   |
|  | ) |                             |
| Employer/Respondent.                       | ) |                             |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on July 15, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul R. Houck, Jacqueline Jenkins, Ed.D., and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Ilona Kirshon  
Deputy State Solicitor  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Ronald Poliquin, Esq.  
on behalf of Dorothy Prior

Allison McCowan  
Deputy Attorney General  
on behalf of the Department of  
Health and Social Services

## **BRIEF SUMMARY OF THE EVIDENCE**

The employee/grievant, Dorothy Prior, Psy.D., offered nine (9) documents into evidence, marked as Exhibits 5, 7, 8, 11, 12, 13, 14, 15, and 16.

The Department of Health and Social Services (“DHSS”) offered four (4) documents into evidence, marked as Exhibits B, C, D, and E.

Dr. Prior testified on her own behalf.

At the conclusion of the Grievant’s presentation, the Agency moved for an involuntary dismissal which the Board denied.

The Agency called two witnesses: DDDS Social Services Chief Administrator Kamin Giglio and DDDS Director of Professional Services Lynda Lord.

## **FINDINGS OF FACT**

Dr. Prior was hired by the DHSS on September 17, 2017, as a psychologist, with the working title of Director of Clinical Supports and assigned to DDDS Community Services. Dr. Prior had a doctoral degree in psychology but was not a Delaware licensed psychologist at the time of hire, although she was license eligible.<sup>1</sup> Her job duties included providing clinical support to four direct reports and serving as co-chair of the Peer Review of Behavior Intervention Strategies committee (“PROBIS”), a committee charged with reviewing and approving Behavioral Support Plans (“BSPs”) submitted by service providers for DDDS clients.

A Legislative Task Force (“Legislative Task Force”) was created in 2019 to provide guidance and monitoring recommendations to DDDS to assist it and the provider community in streamlining the PROBIS approval process. The Legislative Task Force included legislators, community and service provider representatives, and the DDDS Director.

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<sup>1</sup> Dr. Prior became a Delaware licensed psychologist in October, 2020.

By email dated March 4, 2020,<sup>2</sup> Dr. Prior informed her supervisor, the Assistant Director of Community Services, that she could no longer serve as a co-chair of PROBIS because she did not believe DDDS management supported the PROBIS process or its decisions. She believed PROBIS data was being manipulated to satisfy the Legislative Task Force. Dr. Prior felt she could no longer ethically participate in the review and approval process. At that time PROBIS was her primary job responsibility and she spent more than half of her work hours on PROBIS-related tasks.

In a March 9, 2020 meeting, Dr. Prior's supervisor told her that her request to step down as PROBIS co-chair was denied because it was one of her assigned primary job functions. Following that meeting, her supervisor, the Director of Community Services, and the DDDS Director met. The Director suggested reconsidering Dr. Prior's request because there were other DDDS functional groups that could use the services of a psychologist. Applicant Services, which is responsible to review and approve the applications for service of potential clients, was specifically identified as an area of need.

A March 16, 2020 meeting with Dr. Prior was scheduled but was postponed due to the Governor's Emergency Order relating to COVID-19 under which DDDS transitioned to remote work. Dr. Prior met with her supervisor on April 23, 2020 when she was told DDDS would grant her request to resign from PROBIS. Dr. Prior was told that without PROBIS there was insufficient work for her in Community Services. She was notified that she would be transferred from Community Services to Applicant Services because there was a need for a psychologist in Applicant Services. Dr. Prior was also advised that she would no longer be supervising direct reports or serving as Director of Clinical Services<sup>3</sup>. The reassignment did not change Dr. Prior's

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<sup>2</sup> Grievant Exhibit 14

<sup>3</sup> The position of Director of Clinical Services in Community Services no longer exists.

job classification, paygrade, wage rate, benefits, or work location.

The Director of Professional Services was and continues to be Dr. Prior's supervisor in Applicant Services. Dr. Prior was assigned job duties within the Psychologist job classification.<sup>4</sup> Because she was a new employee in the Applicant Services unit, her new supervisor reviewed her personnel file. The file contained no record of Dr. Prior having become licensed in Delaware, which was a prerequisite for some of the tasks Dr. Prior was to be assigned in Applicant Services. The Director contacted the DHSS Labor Relations Unit to seek guidance in determining whether licensing could be required and/or whether Dr. Prior remained "eligible for licensure".<sup>5</sup>

In Applicant Services, Dr. Prior's main assignment was to conduct a quality control program which included reviewing applicant records of current service recipients and entering the data on spreadsheets. She was also assigned Division-wide training responsibilities (which were also delayed due to COVID-19 restrictions). Dr. Prior was advised she would be assigned additional duties once she became licensed.

Grievant maintains that this transfer was in retaliation for her having spoken up about the PROBIS data manipulation problems with BSPs, as well for having advocated on behalf of her direct reports in their requests for promotions. She believes that her reassignment to Applicant Services was a demotion because she no longer has supervisory responsibilities and her work does not utilize her skills, which she believes has negatively affected her career trajectory.

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<sup>4</sup> Grievant Exhibit 12. This exhibit is the Job Posting under which Dr. Prior was hired. The posting contains a listing of the Essential Functions and Job Requirements found in the Classification Description for a Psychologist (MDAIA01).

<sup>5</sup> "JOB REQUIREMENTS for Psychologist: Applicants must have education, training and/or experience demonstrating competence in each of the following areas: (1) Possession of a doctoral degree in psychology; (2) Possession of a Delaware Psychologist license or eligibility for a Delaware Psychologist license." Grievant Exhibit 12. It is undisputed that Dr. Prior was eligible for licensure when she was hired in 2017 and that there had been no requirement placed on her to secure licensure by a date certain.

## CONCLUSIONS OF LAW

Merit Rule 10.5 provides:

**Demotion. Employees may be placed in a position in a lower paygrade upon voluntarily requesting such action, when subject to layoff, or for just cause, if they meet the job requirements for the lower paygrade position. When agencies agree to employee requests for voluntary demotions, the Department of Human Resources may waive job-posting requirements upon written request by the agencies, which justify such action.**

Merit Rule 10.6 provides:

**Transfer. To promote the efficiency of the service, unrelated to employee performance, employees may be transferred to another position for which they meet job requirements in the same paygrade within the same agency with or without competition.**

When Dr. Prior was working in the Community Services unit more than half of work was related to PROBIS, including serving as committee co-chair. She complained to her management about the way she perceived PROBIS data was being manipulated and requested to resign from PROBIS. Removing her from PROBIS reduced her job responsibilities such that her prior position was no longer a full-time job. DDDS' decision to move Dr. Prior from Community Services to Applicant Services was a transfer under Merit Rule 10.6 because it was intended to promote the efficiency of DDDS by adding a psychologist to Applicant Services. It was not a demotion under Merit Rule 10.5 because Dr. Prior was not placed in a lower paygrade and did not suffer any loss in benefits.


Dr. Prior alleged her transfer to Applicant Services resulted from her having spoken out against PROBIS practices and in support of salary increases for two of her direct reports. The United States Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v.*

*Ceballos*, 547 U.S. 410, 421 (2006). The Court emphasized the importance of allowing government employers “sufficient discretion to manage their operations.” *Id.* at 511.

Her advocacy for her direct reports for salary increases and her statements to management about her belief that there was data manipulation at PROBIS in order to satisfy the Legislative Task Force’s expectations were not protected speech because they were made in the course of her official duties. <sup>6</sup> While Dr. Prior may have preferred her prior work to the work she is currently performing, her lateral transfer to another DDDS unit and assignment of new duties within the scope of her job classification were not retaliatory and do not constitute an adverse employment action. The Board further finds neither her transfer and nor the reassignment of duties constitutes discrimination in a human resource action in violation of Merit Rule 2.1,<sup>7</sup> as Dr. Prior had alleged.

**ORDER**

It is this **11<sup>th</sup>** day of **August, 2021**, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss the grievance. The Board finds the Grievant failed to sustain her burden of proving that her lateral transfer to another unit within DDDS was a demotion or that it was retaliatory or discriminatory under the Merit Rules.

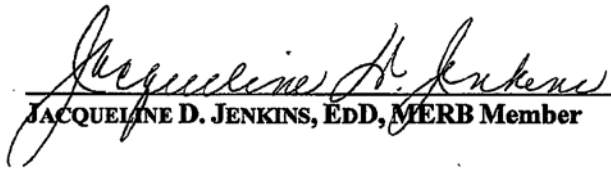
  
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W. MICHAEL TUPMAN, MERB CHAIR

  
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PAUL R. HOUCK, MERB Member

<sup>6</sup> On cross-examination, Dr. Prior admitted that she was expressing her concerns and advocacy within her chain of command as part of her job duties. *Transcript p. 111.*

<sup>7</sup> Merit Rule 2, Non-Discrimination.

2.1 Discrimination in any human resource action covered by these rules or Merit System law because of race, color, national origin, sex, religion, age, disability, sexual orientation, gender identity genetic information or other non-merit factors is prohibited.

  
JACQUELINE D. JENKINS, EDD, MERB Member

  
SHELDON N. SANDLER, ESQ., MEMBER