

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

ELLEN WARREN,)	
)	
v.)	DOCKET NO. 21-02-799
)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,)	DECISION AND ORDER
DIVISION OF DEVELOPMENTAL DISABILITIES)	OF DISMISSAL
SERVICES,)	
)	
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 September 2, 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; Jacqueline D. Jenkins, Ed.D and Sheldon N. Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Ilona Kirshon
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Ellen Warren, *pro se*

Victoria R. Sweeney
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

Ellen Warren, the employee/grievant, offered twenty-four (24) documents into evidence, of which nine (9) were admitted and marked as Grievant Exhibits 5, 6, 7, 10, 12, 13, 15, 18, and 19.

The Department of Health and Social Services (“Agency”) offered six (6) documents into evidence, of which two (2) were admitted and marked as Agency Exhibits C and F.

The Grievant testified on her own behalf.

The Agency called the following witnesses: Marissa Catalon, DHSS/Division of Developmental Disabilities Services Director; and Patricia Justice, Regulatory Specialist, DHR-DHSS.

FINDINGS OF FACT

Ms. Warren began working for the State of Delaware in 1985 and has worked for the Division of Developmental Disabilities (“DDDS”) as a Developmental Disabilities Program Evaluator (Paygrade 16) since February of 2011. The job description for her position states: “The class incumbent is responsible for providing evaluation and monitoring programs in residential living areas to ensure adherence to ICF/IID (Intermediate Care Facility for Individuals with Intellectual Disabilities) and Medicaid Community Rule standards, and facility policies and procedures for individuals with intellectual developmental disabilities.”¹ Prior to September 2020, Ms. Warren worked in the DDDS Data Systems and Analytics Unit (“Data Unit”) where her job duties included tracking, analyzing and reporting service recipients who qualified for home and community based waivers under the federal Medicaid system.

On September 9, 2020, Ms. Warren was notified that she was being reassigned from the

¹ Grievant Exhibit 18

Data Unit to the Office of Incident Resolution (“OIR”) in the Services Integrity Enhancement Unit (“SIE”) because the Data Unit was being disbanded.² The Data Unit had been established in or around 2016 as a centralized unit of four positions to collect and analyze data for various Agency functions. In approximately 2018, management determined that there was duplication within DDDS divisions in the collection of data and that the Data Unit was limited by its lack of operational expertise in developing appropriate queries to effectively use the data.³ It was decided that the Data Unit should be disbanded and that its staff would be more appropriately reassigned to Community Services and SIE, the operating units that primarily relied on the data analysis. The Data Unit was disbanded in 2020.⁴

Ms. Warren was reassigned to serve as a Program Evaluator in the OIR position, where her duties changed from data collection and analysis to being responsible for patient abuse investigations. Maria Winder, a Management Analyst III (Paygrade 16), was also transferred from the former Data Unit to the Technical Enhancement Unit of the SIE.⁵ Ms. Winder was assigned to SIE because of her experience with WellSky, a software system that monitors incident reports and provider evaluations. Tony Avalon, a Quality Assurance Administrator (Paygrade 17), was also transferred from the former Data Unit to Community Services because of his work with the Therap, an electronic case management system.

Ms. Warren is 66 years old; Ms. Winder is 55; and Mr. Avalon is 50.

The waiver tracking system that Ms. Warren worked on when assigned to the Data Unit was being duplicated in the Community Services Waiver Eligibility Unit. The Agency determined

² Transcript pp. 23, 25, 44

³ Transcript p. 68-69

⁴ Transcript pp. 70, 77

⁵ The SIE is a compliance unit which oversees provider and incident management.

it was not necessary for her to continue to perform duplicative work after she was transferred.⁶ Ms. Warren was transferred to the OIR because it was in need of additional support to assist other Program Evaluators. It was determined that Ms. Warren could perform the needed functions in the OIR based on her prior experience in criminal evaluation and investigation in a previous role.⁷ Seniority was not considered when this transfer was implemented.⁸

CONCLUSIONS OF LAW

The Merit Rules provide the following with regard to transfers:

Merit Rule 10.6 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.

DHSS' decision to move Ms. Warren from the Data Unit to OIR was a transfer under Merit Rule 10.6. It was intended to promote the efficiency of the provision of services within the Agency and it was unrelated to her performance. The Agency's determination to disband the Data Systems Unit and reassign staff falls within its authority to "... manage operations and direct employees except as specifically modified by [the Merit] Rules." Merit Rule 1.4.

Ms. Warren alleges the Agency discriminated against her based on her age when it transferred her to OIR.⁹ The grievant bears the burden of establishing a *prima facie* case of age discrimination. To do so, she must establish that: (1) she was a member of a protected class; (2) that she suffered an adverse employment action; and (3) that there is a causal connection

⁶ Transcript p. 79

⁷ Transcript p. 87

⁸ Transcript p. 94

⁹ Grievant also alleges that DHSS should have considered seniority when arranging for her transfer. However, Merit Rule 10.6 does not include seniority as a factor to be considered in lateral transfers. Merit Rule 11.7 relating to Layoffs factors in seniority, and Merit Rule 10.4 relating to Promotions cites to seniority as a factor to be considered.

between the protected class and the adverse employment action. *Ennis v. Del. Transit. Corp.*, 2015 WL 1542151, at *5 (Del. Super., Mar. 9, 2015).

The Board concludes as a matter of law that the Grievant did not establish a *prima facie* case of age discrimination. The Age Discrimination in Employment Act¹⁰ forbids discrimination against individuals who are 40 years of age or older. There is no dispute that Ms. Warren is over 40 years old and that she was transferred to another unit within DHSS. However, the other two employees in the Data Unit, who are also older than 40, were also laterally transferred when the Data Unit was disbanded. There is no evidence on the record that they were treated more favorably than Ms. Warren.

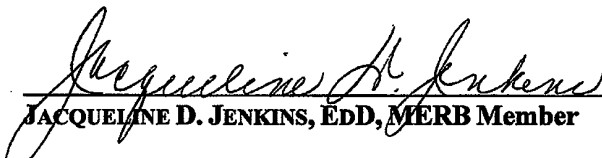
Although Ms. Warren is a member of a protected class, she failed to meet her burden of proving that she suffered an adverse employment action under circumstances that give rise to an inference of age discrimination.

ORDER

It is this **4th** day of **October, 2021**, by a unanimous vote of 3-0, the Decision and Order of the Board to deny the grievance. The Board finds the Grievant failed to establish that her lateral transfer to another unit within DDDS was based on a prohibited age discrimination motive.



W. MICHAEL TUPMAN, MERB CHAIR



JACQUELINE D. JENKINS, EDD, MERB Member

¹⁰ 29 U.S.C. Chapter 14, Section 623. See also 19 *Del. C.* § 711 Discrimination in Employment.



SHELDON N. SANDLER, ESQ., MEMBER