

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

DOROTHY PRIOR, PSY.D.,)	
)	
Employee/Grievant,)	
)	DOCKET No. 22-04-829
v.)	
)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES,)	DECISION AND ORDER
)	
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 December 21, 2022, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Jennifer Cohan, Chair; Victoria D. Cairns, Sheldon N. Sandler, Joseph A. Pika, III, PhD, and Dinah M. Davis-Russ, Members; a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Jennifer Singh
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Ron Poliquin, Esq.
on behalf of the Employee/Grievant

Lauren Maguire, Esq.
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 ten (10) documents as evidence. After the prehearing conference, the Board admitted Grievant Exhibits 2 - 9 into evidence.¹

The Department of Health and Social Services, Division of Developmental Disabilities Services (“Agency”) offered seventeen (17) documents into evidence, marked as Agency Exhibits A through Q. After the prehearing conference, the Board admitted Agency Exhibits A, B (as amended), C - J, M, O, and P.²

Dr. Prior testified on her own behalf and called one witness, Heather Courtney, R.N., DHSS/DDDS. Two witnesses testified on behalf of the Agency: Linda Lord, Director of Professional Services, DDDS, and Marissa Catalon, DDDS Director.

FINDINGS OF FACT

Dr. Prior was hired in September 2017 into DDDS Community Services in a Psychologist position. In April, 2020 she was transferred to DDDS Applicant Services where she was assigned, among other responsibilities, to:

Review the scanned records of all applicants who were determined eligible starting in 2015 (then 2016, 2017, 2018, --- until April 2019). The reviews begin with individuals under 22 then phase two is for individuals aged 22 – 35. The reviews should include clinical information that either supports or does not support eligibility and place information on designated spreadsheet. Fifteen reviews per day is the benchmark. If the benchmark is not met, indicate reasons on designated tracking tool...

... Select, administer and score a wide variety of psychological tests to assess and formulate a diagnosis of Autism Spectrum Disorder (ASD) and/or Intellectual Disability (ID) using designated standardized assessments. Selects,

¹ Grievant Exhibits 1 and 10 were duplicative of Agency Exhibit M yet did not include all of what was included in Agency Exhibit M. During the prehearing conference, the parties agreed to strike Exhibits 1 and 10.

² Agency Exhibits K, L, and N were duplicative of Grievant Exhibits 9, 8, and 6 respectively, and Exhibit B was partially duplicative of Grievant Exhibits 4 and 5, so it was amended to include only the State of Delaware Performance Plan. With no objection from the parties, Exhibit Q was stricken as not relevant to the current grievance.

administers, and scores adaptive functioning assessments using designated standardized assessments to measure adaptive behavior functioning. The written reports are due within ten (10) business days after the evaluation; an extension to the timeframe of 10 business days may be requested due to extenuating circumstances.

Interpret a wide variety of psychological assessments and provide written justification for eligibility recommendation based on DDDS eligibility criteria...³

In this position, Dr. Prior was supervised by the Director of Professional Services. *Agency Exhibits A, B.* At the time of her reassignment, she, like most other employees was working remotely due to the COVID-19 pandemic. At some point, Dr. Prior was provided with a telecommuting agreement under which she continued to work remotely from her home.⁴

In December 2020 and January 2021, Dr. Prior advised her supervisor that she needed extra time to insert the data from her review of the scanned record of applicants into the designated spreadsheets. By email dated March 2, 2021, Dr. Prior's supervisor notified her that the supervisor was unable to locate any review data that had been saved in the shared R-drive since mid-October 2020. The supervisor directed Dr. Prior to send the review data to her directly by email and to also place it on the R-drive by no later than March 5, 2021. Thereafter, Dr. Prior failed to respond to successive requests for the review data from her supervisor on March 26, March 31, April 30, and May 28, 2021. *Agency Exhibit E.*

In an email dated May 28, 2021, her supervisor notified Dr. Prior:

I have not received a response to the email below on how you have complied with the telecommuting agreement and you continue to not respond to my emails.

It's time to plan your return to the office. You may begin a hybrid model next week, then, plan to return to Fox Run daily from 8:00 – 4:30 beginning on June 7, 2021. You are also expected to sign in and out at the front desk daily. I plan to begin to bring the assessments to you at the office next week once you

³ Agency Exhibit B.

⁴ Agency Exhibit C, "Alternative Work Arrangements Policy and Procedures".

provide your schedule for next week and provide assurance that you have a locking file cabinet to accommodate approximate [sic] three large drawers of assessments.

Dr. Prior responded to her supervisor by email on June 2, 2021, that she would not be able to return to the office on June 7th as “I have a new puppy who can’t be left unattended yet.” *Agency Exhibit E*. Dr. Prior did not report to work on June 7 as she had been directed.

By certified letter dated July 22, 2021 Dr. Prior received a second notice directing her to return to work on Monday, July 26 at 8:00 a.m. The letter advised that failure to return as directed could result in further action up to and including termination. *Agency Exhibit F*. Dr. Prior requested and was approved for annual leave the week of July 26, 2021.

Dr. Prior returned to the office on August 2, 2021 and also worked August 3 and 5 of that week. She met with her supervisor and the DDDS Director on August 3. Beginning on August 10, Dr. Prior made daily requests through the automated attendance system (EStar) to use her accrued sick leave.

By email dated August 19, 2021, Dr. Prior requested a telecommuting agreement, stating that she had injured her hand in a manner which made it unsafe for her to drive into the office, asserting she was able to continue her review of the scanned eligibility files remotely. She concluded her email stating she believed the unwillingness of her supervisor and the DDDS Director constituted continued retaliation for her having filed a MERB grievance and an EEOC charge in 2020. *Agency Exhibit G*. After her supervisor forwarded the August 19 email to the DHSS/DHR Diversity and Inclusion Manager (who also served as the Agency’s ADA Coordinator) to provide information on seeking an ADA accommodation, Dr. Prior responded:

I believe you may have received miscommunication. I have not asked for an accommodation under the ADA. I don’t have a disability so I would not qualify. What I have been requesting for months is a telecommute agreement, as other DDDS staff have been given. *Agency Exhibit I*.

By notice dated September 22, 2021, Dr. Prior was provided continuous FMLA protections for her absence due to the hand injury for the period of August 10 through October 22, 2021. *Agency Exhibit P*. On September 23, 2021, Dr. Prior requested to return to light duty and to amend her continuous FMLA to intermittent. *Employee Exhibit 4*. Her request was not granted.

At the conclusion of her FMLA leave, Dr. Prior did not return to work on October 25, 2021. On November 2, 2021 the ADA Coordinator advised Dr. Prior that if she wanted to apply for an ADA accommodation she needed to submit specific documentation, including information from her treating physician. *Employee Exhibit 5*.

On November 15, 2021, the DDDS Director sent Dr. Prior notification of the intent to terminate her employment because she failed to return to work following the expiration of her FMLA leave. *Employee Exhibit 6*. Dr. Prior exercised her right to a pre-termination hearing and during the meeting, stated that she was awaiting documentation from her doctor to support her ADA accommodation request. *Agency Exhibit O*. Following the hearing, the DDDS Director withdrew the Pre-Termination Letter to allow Dr. Prior to resume her efforts to request an ADA accommodation. *Id.* Dr. Prior never submitted timely documentation from her doctor to support her request. *Agency Exhibit P*. On October 22, 2021, Dr. Prior filed a civil complaint against DDDS, her supervisor and the DDDS Director in US District Court for the District of Delaware. *Employee Exhibit 2*.

On April 25, 2022, Dr. Prior filed a grievance alleging she was prohibited from entering into a telework agreement with the Agency and was denied access to her accrued sick and/or annual leave for workdays she missed following the expiration of her Family Medical Leave Act (“FMLA”) leave. Dr. Prior alleged the Agency violated Merit Rule 2.1, Non-Discrimination, because it acted in retaliation for her filing an EEOC discrimination complaint in federal court. Her grievance was processed according to the grievance procedure set forth in Merit Rule 18, and

was appealed to this Board following a Step 3 decision issued by the Department of Human Resources.

CONCLUSIONS OF LAW

Merit Rule 2.1 states:

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.

The Board concludes as a matter of law that the Agency did not discriminate against the Grievant as a result of her protected activities. Dr. Prior claims that DDDS's refusal to allow her to telecommute was because she filed an ADA request, grievance, and federal lawsuit. *Complaint*. An agency has discretion as to whether to allow an employee to telecommute. *Agency Exhibit C*, Tr. 87:2-7, 111:1-5. While Dr. Prior was telecommuting in 2020-2021, she was not completing her work, not communicating with her supervisor, and did not return to the office when directed to do so. *Agency Exhibit E*. As such, the Agency had a justifiable basis on which to deny her request to telecommute. Tr. 91:9-13.

Dr. Prior filed a federal lawsuit against DDDS, her supervisor and the DDDS Director on October 22, 2021, the day after her FMLA leave expired. *Employee Exhibit 2*. The Agency did not, however, receive notice of that lawsuit until early February 2022, thereby undermining the claim of retaliation. Dr. Prior did not return to work when her approved FMLA period lapsed; did not communicate with her supervisor to explain why she was not working; and never completed an ADA request. *Agency Exhibit P*, Tr. 91:23-94:24. Simply stated, Dr. Prior repeatedly failed to comply with her employer's directive to return to work.

The Board concludes as a matter of law that the Grievant did not meet her burden to establish that the Agency violated MR 2.1 or otherwise discriminated or retaliated against her in declining to

grant her request for a telecommuting agreement and/or by denying her use of her accumulated leave following the expiration of the FMLA period. The Agency provided substantial evidence of numerous bases on which it chose to reasonably exercise its discretion to deny her telecommuting agreement after she failed to return to work as directed.

ORDER


It is this 2nd day of February 2023, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the grievance.




JENNIFER COHAN, MERB Chairperson




VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER



JOSEPH A. PIKA, III, PH.D., MEMBER



DINAH DAVIS-RUSS, MEMBER