

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

ELLEN WARREN,)
)
 Employee/Grievant,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND SOCIAL)
 SERVICES, DIVISION OF DEVELOPMENTAL)
 DISABILITIES SERVICES,)
)
 Employer/Respondent.)

DOCKET No. 21-02-799

Decision and Order on Remand

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 1:03 p.m. on June 7, 2023, at the Delaware Division of Professional Regulation, in the Second Floor Hearing Room A, Cannon Building, 861 Silver Lake Blvd., Dover, Delaware 19904.

BEFORE Jennifer Cohan, Chair; Joseph A. Pika, III, Ph.D. 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

Ellen Warren, *pro se*
Grievant

Lauren Maguire
Deputy Attorney General
on behalf of the Department of
Health and Social Services

PROCEDURAL BACKGROUND

Ellen Warren (“Grievant”) grieved her transfer within the Delaware Department of Health and Social Services, Division of Developmental Disabilities Services (“Agency”) from the Data Systems Unit to the Compliance Unit in the Office of Incident Resolution. She asserted that the Agency did not consider her seniority prior to her transfer and that her transfer was discriminatory based upon her age. A hearing on the merits was convened by the Merit Employee Relations Board (“Board”) on September 2, 2021, at which time the Board denied the grievance.¹

Ms. Warren appealed that decision to Superior Court and on May 24, 2022, the Court reversed and remanded the Board’s decision for the Board to consider two distinct issues: 1) whether Ms. Warren's transfer met any of the statutorily pronounced conditions in which seniority must be considered; and 2) whether Ms. Warren’s transfer was a result of age discrimination.² *Warren v. Del. Dep’t. of Health & Soc. Servs.*, 2022 WL 1665090 at * 7 (Del. Super. May 24, 2022). Under the Court’s decision, the parties were afforded the opportunity to propose additional exhibits and witnesses. This is the Board’s decision following the hearing on remand.

BRIEF SUMMARY OF THE EVIDENCE

Ellen Warren, the employee/grievant (“Grievant”), offered four additional documents into evidence for this remand hearing. Two were admitted into evidence as Grievant Exhibits 25 and 27. An additional exhibit, Grievant Exhibit 29, was admitted by the Board during the June 7,

¹ *Ellen Warren v. DHSS/DDDS*, MERB Docket 21-02-799, Decision and Order of Dismissal (MERB Oct. 4, 2021).

² *Ellen Warren v. DHSS/DDDS*, C.A. No. K12A-11-001 NEP (Super.Ct, May 24, 2022).

2023 hearing. The Board also reviewed Grievant Exhibits 5-7; 10; 12-13; 15; and 18-19 which were admitted at the September 2, 2021 Board hearing.

The Department of Health and Social Services (“DHSS” or “Agency”) did not offer additional exhibits for the remand hearing. The Board reviewed the Agency Exhibits C and F which were admitted at the September 2, 2021 Board hearing.

The Grievant testified on her own behalf and called the following witnesses from DHSS’ Division of Developmental Disabilities Services: Social Services Senior Administrator Colleen Jones; Management Analyst III Maria Winder; and Management Analyst III John McDermott.

The Agency called the following witness from DHSS’ Division of Developmental Disabilities Services: Director of Program Integrity Katie Howe.

FINDINGS OF FACT

Ms. Warren began working for the Division of Developmental Disabilities (“DDDS”) as a Developmental Disabilities Program Evaluator (Paygrade 16) in February 2011.³ Her position was responsible for evaluating and monitoring programs in residential living areas to ensure adherence to standards, and facility policies and procedures for individuals with intellectual/developmental disabilities.⁴ Ms. Warren’s job duties included tracking, analyzing, and reporting home and community-based waivers under Medicaid.⁵ Ms. Warren’s position was within the Data Systems and Analytics Unit (“Data Unit”), which was formed to collect and analyze data for the various needs of DDDS. The Data Unit employed three employees and one supervisor.

In 2018, DDDS decided to disband the Unit and reassign the staff to different units,

³ Agency Exhibit F.

⁴ Grievant Exhibit 18.

⁵ *Id.* and September 2, 2021 Transcript (“2021 TR”) pp. 18-19.

including the Community Services Unit and Services Integrity Enhancement Unit (“SIE”), the two DDDS operating units that primarily relied on the Data Unit’s analyses.⁶ The Data Unit was officially disbanded in 2020 and Ms. Warren was reassigned to the DDDS Office of Incident Resolution (“OIR”) in the SIE Unit in September of 2020.⁷ She maintained the same paygrade and job title but her duties now involved patient abuse investigations.⁸ The other two Data Unit employees also maintained their titles but were reassigned. Maria Winder (“Winder”), a Management Analyst III (Paygrade 16), was reassigned to the Service Integrity Enhancement Unit because of her expertise in the WellSky Aging and Disability Database System—a system Ms. Warren neither used regularly nor had access to while in the Data Unit.⁹ When Ms. Winder was reassigned she performed primarily the same duties with the exception of going from serving as Ms. Warren’s backup in Therap (a comprehensive documentation and communication application) administration to the primary performer of that function.¹⁰ Ms. Winder was not qualified to perform the Program Evaluator job to which Ms. Warren was reassigned.¹¹ Ms. Winder was 55 years old at the time of the reassignment.

The third employee from the disbanded data unit, Tony Avalon (“Avalon”), a Quality Assurance Administrator (Paygrade 17), was reassigned to Community Services because of his work with the Therap system. Although Ms. Warren was also working with the Therap system, Mr. Avalon was a higher pay grade than Ms. Warren; therefore, the position to which he was reassigned would not have been an equivalent lateral transfer for Ms. Warren. Mr. Avalon was

⁶ 2021 TR p. 70.

⁷ Grievant Exhibit 12.

⁸ *Id.*

⁹ 2021 TR p. 71-74, 79, 95.

¹⁰ June 7, 2023 Hearing Transcript (“2023 TR”) pp. 45-46.

¹¹ 2021 TR pp. 79-80, 81.

50 years old at the time of the reassignment.

Following the disbandment of the Data Unit, Ms. Warren met with several Management Analyst employees to review and demonstrate several of her previous job duties.¹² According to Colleen Jones, one of those employees, many of these tasks were already being performed by members of her unit.¹³ Those that were not being duplicated were reassigned to another employee, Shauna Rodriguez. Ms. Jones estimated the additional work transferred from the former Data Unit took approximately three and a half to five hours per month to complete in the SIE Unit.¹⁴ John McDermott (a Management Analyst who was hired in 2018) was assigned some of Ms. Warren's job duties in 2018 while Ms. Warren was out on leave. Those duties remained with Mr. McDermott after Ms. Warren returned to work.¹⁵

The OIR unit to which Ms. Warren was transferred employed a number of Program Evaluators and needed additional support. Based on DHSS analysis of trends, the need for Program Evaluators increased significantly from the time the unit was formed.¹⁶ The OIR Program Evaluator position required a "unique skill set" that not everyone met, including having a bachelor's degree.¹⁷ Ms. Warren had previous investigative training when she worked at the Delaware Psychiatric Center and held a Program Evaluator position.¹⁸ She acknowledged Program Evaluators in OIR were "absolutely important" and that having prior experience working for the state of Delaware was beneficial to the role.¹⁹ She was transferred to OIR because she

¹² 2023 TR p. 18.

¹³ 2023 TR pp. 24, 27.

¹⁴ 2023 TR pp. 29-30.

¹⁵ 2023 TR p. 68.

¹⁶ Grievant Exhibit 10.

¹⁷ *Id.* and 2023 TR p. 108.

¹⁸ 2021 TR p. 52.

¹⁹ 2021 TR pp. 60-61.

could perform a much needed role in the Division that Ms. Winder could not.²⁰

DDDS did not consider the Program Evaluator position to be simpler than a Management Analyst,²¹ and the Director of the Division understood that Ms. Warren had experience in investigations in a previous role with the State.²² DHSS acknowledged it did not consider seniority when the three employees from the data unit were reassigned.²³ Ms. Warren was notified of the reassignment on September 9, 2020 and filed the grievance on September 21, 2020. The Grievant did not perform any job duties in the OIR Program Evaluator position prior to filing her grievance.²⁴

CONCLUSIONS OF LAW

Ms. Warren alleged two violations by DHSS—1) that the Agency discriminated against her based on her age and 2) the Agency impermissibly failed to consider seniority when transferring her to OIR. The Delaware Supreme Court has adopted the *McDonnell Douglas* framework for age discrimination claims. *Riner v. Nat'l Cash Register*, 434 A.2d 375, 376-77 (Del. 1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under *Riner*, Ms. Warren was required to establish a *prima facie* case of age discrimination, including (1) that she was within the protected age group, (2) that she was qualified for the position in question, (3) that she suffered an adverse employment action, and (4) that she was replaced by a significantly younger person or a person outside the protected age group. *Id.* Here, the Board agreed that Ms. Warren was within the protected class but found that she did not suffer an adverse

²⁰ 2021 TR pp. 79-80.

²¹ 2021 TR p. 98.

²² 2021 TR p. 87.

²³ 2021 TR p. 94.

²⁴ 2023 TR pp. 82-83.

employment action and was not effectively replaced by a younger employee.

Regarding adverse employment actions, Delaware Courts have noted that *significant* changes in employment status, including reassignment with significantly different responsibilities can be found to be adverse employment actions but the action “must be serious and tangible enough to alter [the] employee’s compensation, terms, conditions, or privileges of employment.” *Termonia v. Brandywine Sch. Dist.*, 2014 WL 1760317, at *4 (Del. Super. Apr. 16, 2014), *aff’d*, 108 A.3d 1226 (Del. 2015) (TABLE). Additionally, “not everything that makes an employee unhappy is an adverse employment action.” *Id.*

During the second hearing, the Board noted that throughout the first hearing Ms. Warren agreed that the position to which she was being reassigned did not have a poor reputation and would not be perceived as a demotion. The Board, therefore, questioned how the reassignment constituted an adverse action. When asked to clarify why the Program Evaluator position in OIR was undesirable, Ms. Warren stated “I didn’t want the job. I never sought the job.”²⁵ When asked why someone would choose the Data Analyst position rather than patient investigations, Ms. Warren replied, “...for me, there’s not an external reason. It’s totally an internalized reason. It’s what I wanted to do. It’s what I wanted to do. That’s all.”²⁶

During the hearing Ms. Warren articulated that she believed her physical limitations would preclude her from performing the job; however, she acknowledged she did not perform a single duty in the OIR position before she filed the grievance.²⁷ Contrary to her testimony in the first hearing that she was limited to one hour of driving per day,²⁸ during the remand hearing, Ms.

²⁵ 2021 TR p. 51.

²⁶ 2021 TR p. 60.

²⁷ 2023 TR p. 82.

²⁸ 2021 TR p. 49.

Warren acknowledged that her doctor did not want her driving more than two hours per day.²⁹ In addition, Katie Howe, an OIR supervisor, testified that Ms. Warren asked about ADA accommodations for the new position and was told that DDDS would work with the ADA Coordinator and Department of Labor to assist Ms. Warren.³⁰ Nonetheless, Ms. Warren filed this grievance without attempting to perform the duties of the OIR Program Evaluator position, with or without accommodations.

The Board found Ms. Warren's claims about the adverse impact of the OIR Program Evaluator position lacked credibility as she acknowledged the position was very important, and the claims about her physical limitations changed from hearing to hearing. Moreover, Ms. Warren never attempted to perform the duties of the new position nor did she work with the Agency to develop reasonable accommodations. Her job title, pay, hours, and benefits were not affected, and she was filling a crucial role that neither of the other former Data Unit employees were qualified to fill. As such, the Board did not find that the reassignment was an adverse employment action.

The Board further noted that even if Ms. Warren's reassignment was deemed an adverse employment action, she was not effectively replaced by a younger DHSS employee. Ms. Warren claims that she trained several younger employees to take over roles which were previously primarily hers, but that is not what the testimony bore. Ms. Jones testified that her unit (SIE) was duplicating much of the work which was also being performed by the Data Unit.³¹ She further noted that the tasks Ms. Warren claimed to have trained six to seven others to perform amounted to less than 10-15% of one employee's job, and no work or tasks were taken away from the

²⁹ 2023 TR p. 86.

³⁰ 2023 TR p. 125.

³¹ 2023 TR pp. 24, 27.

employee to whom the duties were assigned after the Data Unit was disbanded.³² Ms. Winder testified that she continued to perform her work in the WellSky system, a system Ms. Warren did not have access to prior to the reassignment, and switched from sharing or backing up Ms. Warren on a smaller task to primarily performing it. She was not asked to learn a new task previously performed by Ms. Warren.³³ Finally, John McDermott acknowledged that he took over one of Ms. Warren's job tasks but that this occurred in 2018, two years before Ms. Warren was reassigned.³⁴ Based upon the testimony elicited from the Grievant's witnesses, the Board found that adding approximately three to six hours of work per month to one employee's workload did not support Ms. Warren's assertion that she was effectively replaced by a significantly younger employee.

Finally, Ms. Warren argued that DHSS violated 29 *Del. C.* § 5928 when it failed to consider her seniority prior to the reassignment of the Data Unit employees. Under Merit Rule 10.6, "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" to promote efficiency, but under 29 *Del. C.* § 5928, an agency must consider seniority in service when transferring an employee due to abolition of a position. DHSS' decision to move Ms. Warren from the Data Unit to the OIR Unit was an allowable transfer under Merit Rule 10.6. DHSS should, however, have considered seniority when it did so. DHSS argued that while it did not consider Ms. Warren's seniority, the result of the reassignment would not have changed had it done so. Under 29 *Del. C.* § 5928, seniority is not the only factor an agency must consider when transferring employees. The Board agreed with Ms. Warren that DHSS violated the statute but found, based on the

³² 2023 TR pp. 34-35, 37.

³³ 2023 TR p. 46.

³⁴ 2023 TR p. 68.

circumstances involved in the transfer, this violation did not affect Ms. Warren. For example, although Mr. Avalon had less seniority than Ms. Warren, he was in a higher paygrade. Consequently, Ms. Warren was not qualified or eligible to be transferred to the position to which Mr. Avalon was transferred. Conversely, Ms. Winder did not have the experience, training, and background that Ms. Warren had in performing investigations. Consequently, she was not qualified for position to which Ms. Warren was transferred. Ms. Warren held a Program Evaluator position while working in the Data Unit and was transferred into a Program Evaluator position in the OIR Unit when the Data Unit was disbanded.

The Board found that although DHSS did not explicitly consider Ms. Warren's years of service, it considered the factors associated with those years. Of the three Data Unit employees, Grievant was the most qualified to assume the role of a Program Evaluator in OIR due to her previous experience and training. As such, the Board found Ms. Warren was not prejudiced as a result of DHSS' failure to explicitly consider seniority when transferring her when the Data Unit was disbanded.

Finally, the Board finds no merit to Ms. Warren's claims about a long-running plan to transfer or single her out or that Katie Howe advised her DHSS was transferring her to a "simpler" position. Ms. Warren attempted to introduce evidence of actions that took place in 2018 claiming that she believed DHSS demonstrated a pattern of singling her out.³⁵ She claimed that one example of that pattern was that she was not selected to interview for a Management Analyst position in 2018. However, Ms. Howe testified that a few months prior to the Management Analyst position being posted, Ms. Warren was invited to interview for a Quality Assurance Administrator position (Paygrade 17). Ms. Warren declined, expressing a lack of interest in the

³⁵ 2023 TR pp. 63, 77.

type of work detailed in the summary statement of duties for the position.³⁶ That same summary statement was used for the Management Analyst position posted shortly thereafter.³⁷ As a result, Ms. Howe elected not to interview Ms. Warren.³⁸

Similarly, the Board found no merit to Ms. Warren's claim that DHSS demonstrated age-based bias against her when Ms. Howe allegedly stated the new position would be "simpler."³⁹ Not only did Ms. Howe deny saying this,⁴⁰ but this claim is inherently undercut by Ms. Warren's primary argument that the job transfer was an adverse employment action because it would be *more difficult* for her to perform. In general, the Board found Ms. Warren's claims about what occurred in 2018 irrelevant to the current grievance but also not demonstrative of a pattern of discrimination. The Board found no evidence that DHSS told Ms. Warren it was simplifying her work.

For the foregoing reasons, the Board concludes as a matter of law that the Grievant did not establish a *prima facie* case of age discrimination as she did not set forth sufficient evidence to show she suffered an adverse employment action or was replaced by a significantly younger person. Further, the Board concludes that DHSS failed to comply with 29 *Del. C.* § 5928 when it did not consider Ms. Warren's seniority prior to the transfer, but because the outcome would have been the same had it done so, Ms. Warren was not prejudiced by DHSS' statutory violation.

ORDER

It is this 17th day of August 2023, by a unanimous vote of 3-0, the Decision and Order of the

³⁶ 2023 TR pp. 115-116.

³⁷ *Id.*

³⁸ 2023 TR p. 116.

³⁹ 2023 TR pp. 80-81.

⁴⁰ 2023 TR p. 98.

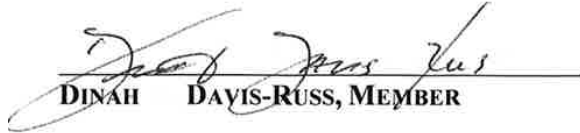
Board to deny the grievance.



JENNIFER COHAN, MERB Chairperson



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



DINAH DAVIS-RUSS, MEMBER