

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

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| ELLEN WARREN, |) | |
| |) | |
| Employee/Grievant, |) | |
| |) | DOCKET No. 21-02-799 |
| v. |) | |
| |) | DECISION AND ORDER |
| DEPARTMENT OF HEALTH AND SOCIAL |) | DENYING MOTION FOR |
| SERVICES, DIVISION OF DEVELOPMENTAL |) | RECONSIDERATION |
| DISABILITIES 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 9:01 a.m. on December 6, 2023, at the Delaware Division of Professional Regulation Hearing Room A, Cannon Building, 2nd Floor, 861 Silver Lake Blvd., Dover, Delaware 19904.

BEFORE Jennifer Cohan, Chair, Lester E. Johnson, Jr., Joseph A. Pika, III, Ph. D., and Sheldon N. Sandler, Esq., 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*
Employee/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”). 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.² A hearing on remand was held on June 7, 2023 before the Board, and the Board again denied Ms. Warren’s grievance. The Board issued an Order reflecting this decision on August 17, 2023.³

On August 22, 2023, Ms. Warren filed a Motion for Reconsideration. Her Motion generally contends that the Board’s decision is based upon misapprehensions of the law and fact. She contends that the Board failed to consider the “totality of the circumstances,” when it found the Agency did not discriminate against her in violation of Merit Rule 2.1, and more specifically that the Board relied solely on a claim of age discrimination versus age discrimination in conjunction with “allegations of discrimination based on non-merit factors.” Finally, Ms. Warren appeared to argue that the Board ignored or was not aware of a change in precedent or legal principle based upon an unpublished May 31, 2023 Third Circuit Opinion in *United States Equal Employment Opportunity Commission v. Novo Nordisk, Inc.* C.A. No. 22-3482 (ZNQ) (RLS) (D.N.J. May 31, 2023).

The Agency filed its response to Ms. Warren’s Motion on September 8, 2023, noting that “[a] motion for reconsideration or reargument is not an opportunity to rehash arguments already

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

² *Warren v. Del. Dept. of Health & Soc. Servs.*, 2022 WL 1665090 at * 7 (Del. Super. May 24, 2022).

³ *Ellen Warren v. DHSS/DDDS*, MERB Docket 21-02-799, Decision and Order on Remand (MERB, Aug. 17, 2023).

decided by the Court, or to present new arguments that were not previously raised.”⁴ The Agency further noted that Ms. Warren’s Motion argued that the Board should have elicited certain testimony from her witnesses or extrapolated information from the hearing thus demonstrating her misunderstanding as to who holds the burden of proof in this matter.

Following oral argument by both parties on December 6, 2023, the Board unanimously denied the Grievant’s Motion for Reconsideration.

DISCUSSION

As the Grievant’s Motion notes, in order to be successful in a Motion for Reconsideration, “...the moving party [must] demonstrate that the court overlooked a precedent or legal principle that would have a controlling effect, or that it has misapprehended the law or the facts in a manner affecting the outcome of the decision.”⁵ Here, the Board noted that the arguments raised by Ms. Warren in her Motion and oral argument do not raise new evidence or facts but rather reflect her “disagreement with the conclusions that [the Board] drew from those facts, and unhappiness ... with the result.”⁶ The Board noted it could not consider any facts relating to Ms. Warren’s ultimate termination, either during the initial hearing or Motion for Reconsideration as those facts relate to a separate and distinct grievance which was still pending before the Department of Human Resources. In addition, the Board noted that it was not its role to infer or extrapolate facts from the Grievant’s evidence or witnesses or to question the witnesses she subpoenaed to testify. In short, the Board found that Ms. Warren’s Motion did not raise any new information, let alone compelling new facts which warrant reconsidering its August 2023 decision.

⁴ Agency Response p. 2, citing *Patterson-Woods & Assocs., LLC v. Independence Mall, Inc.*, 2019 WL 6329069, at *1 (Del. Super. Ct. Nov. 26, 2019).

⁵ Grievant Motion p. 1, citing *Ferguson v. Vakili*, 2005 WL 628026 at *1 (Del. Super. March 16, 2005).

⁶ December 6, 2023 hearing transcript p. 21.

In regard to Ms. Warren’s argument that the Board erred because it did not consider the “totality of the circumstances,” the Board noted that the Superior Court remanded Ms. Warren’s case to the Board to consider two very specific questions. Ms. Warren repeatedly argued that the Board should have considered factors beyond her age when determining whether the Agency discriminated against her. The Board noted that one of the Court’s two specific instructions was to determine whether Ms. Warren’s transfer was a result of age discrimination. When asked about this during oral argument, Ms. Warren replied that she did not see anywhere in the Court’s opinion that the Board could *only* consider age. The Board found that during the June 7, 2023 hearing, Ms. Warren never asked the Board to answer questions outside of the Court’s instruction, and the Board clearly considered factors relating to her seniority, not just age.

Finally, the Board considered whether Ms. Warren raised any new legal precedent or principles, particularly when citing to *United States Equal Employment Opportunity Commission v. Novo Nordisk, Inc.* C.A. No. 22-3482 (ZNQ) (RLS). The Board found that it did not overlook or misapprehend legal precedent in a manner that would have affected the outcome of the decision. As the Agency noted, the case to which Ms. Warren cited was decided prior to the June 7, 2023 remand hearing. Additionally, the Board noted that Ms. Warren cited to language in *Novo Nordisk* that the Courts first used long before that decision and the June 2023 remand hearing. In fact, the *Novo Nordisk* quote that she cited was a direct quote from a 2015 case, which, in turn, was a direct quote from a 2004 case.⁷ Moreover, in *Novo Nordisk*, the Third Circuit granted an employer’s Motion to Dismiss against the EEOC, finding that the “Complaint fails to identify any specific harm [the employee] suffered as a result of Defendant denying her transfer.”⁸ The legal precedent to

⁷ In *Novo Nordisk*, the Court states that “[t]he Third Circuit has ‘described an adverse employment action as an action by an employer that is serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment.’ *Jones v. SEPTA*, 796 F.3d 323, 326 (quoting *Storey v. Burns. Intern. Sec. Serv.*, 390 F.3d 760, 764 (3d Cir. 2004)).”

⁸ *EEOC v. Novo Nordisk, Supra*, p. 6.

which Ms. Warren referred was neither novel nor supportive of her case.

For the reasons stated herein, the Board denies the Grievant's Motion for Reconsideration.

ORDER

It is this 20th day of February, 2024, by a unanimous vote of 4-0, the Decision and Order of the Board to deny the Grievant's Motion for Reconsideration.



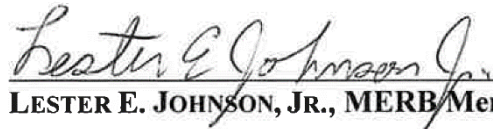
JENNIFER COHAN, MERB Chairperson



SHELDON N. SANDLER, ESQ., MEMBER



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



LESTER E. JOHNSON, JR., MERB Member