

In response to the Pilot Program, the DNA Lab Workers submitted applications to participate. The State Police reviewed its operational needs and decided to exempt the DNA Lab Workers from the Pilot Program. Thereafter, the DNA Lab Workers filed a grievance. Initially, a Step 1 meeting was held, but it was mutually determined that an agreement could not be reached. Thereafter, a Step 2 hearing was held. In the hearing officer's May 4, 2023, decision, the hearing officer denied the DNA Lab Workers' grievance. Thereafter, the DNA Lab Workers filed the subject request.

In their appeal, the DNA Lab Workers present that the hearing officer denied their grievance because "the Grievants did not establish why their judgment should be substituted for the legal authority given to the management in the NJSP to make that determination" and that "the security issue was not fully addressed." In response, the DNA Lab Workers state that these conclusions do not address the lack of evidence provided by State Police management for the supposed security and confidentiality concerns, nor did management provide any examples of any telework-induced security or confidentiality breaches. Moreover, they assert that the DNA Unit maintained accreditation during and since the COVID-19 pandemic without receiving a single negative finding related to data security and/or confidentiality. Further, the DNA Lab Workers provide that the decision concludes that "many protocols were not strictly adhered to as they normally should have been." However, they state that the only protocol that was not fully adhered to during the period of COVID-19 telework was one where management made the decision to not follow policy. The DNA Lab Workers assert that all the employees can telework by bringing nothing home except their State-issued and password-protected laptops with virtual private network (VPN) access. Moreover, they provide that other states and FBI forensic laboratory staff are working from home as there is nothing in the standards that prevents it. The DNA Lab Workers highlight that during COVID-19 telework, where only 50 percent of staff were on-site, case backlogs were reduced from 1,000 to under 100. Further, the State Police's Telework Pilot Program states that if an employee believes that they can perform their duties remotely, they should complete their application for telework. Therefore, as the DNA Unit is ideally suited for telework, 14 employees applied, and their direct supervisors approved their application. The DNA Lab Workers assert that there is no one better than their direct supervisors to assess whether telework is suitable for their employees. Further, they contend that management has made unsubstantiated arguments against telework. Specifically, they indicate that while management claims that telework poses a security threat, the State Police has a Statewide Information Security Manual that provides for comprehensive security of State data. Additionally, while the State Police argues that telework does not meet accreditation standards, the DNA Lab Workers state that this is not true as many accredited forensic laboratories, including the FBI, telework.

Additionally, the DNA Lab Workers assert that whether the State Police abused its discretion, and therefore violated Civil Service law or rules, is a fact-intensive inquiry that requires circumstance-specific discussion and analysis. They argue that although the Commission previously ruled against certain clerical staff's appeal of the denial of their grievance regarding their exclusion from the Department of Children and Families' Telework Program, they state that their grievance warrants an independent discussion and analysis. The DNA Lab Workers contend that a thorough review of their grievance appeal demonstrates that they have a successful history of telework, and they can continue to telework. The DNA Lab Workers present that many of their workers devote a larger portion of their time to tasks conducted at their computer and desks, as compared to time spent conducting on-site laboratory work, such as data analysis and writing reports, which are tasks that can be performed remotely. Moreover, the DNA Lab Workers submit substantial evidence of other similarly situated DNA laboratory workers who participate in telework programs, including the FBI and other states like Delaware, which face similar chain of custody concerns. They reiterate that the alleged security concerns are unfounded and should be granted limited, if any, consideration. While they acknowledge that the Director of the OFS is entitled to his opinion, they believe that it is crucial to recognize that opinions concerning data security issues should be evaluated within the context of the person's background and expertise in the field. The DNA Lab Workers asserts that the Director does not have the requisite background or expertise to make this determination as data security is a complex and rapidly evolving domain, requiring a deep understanding of technology, encryption, cyber threats, and legal implications. Without the necessary expertise, they contend that layman opinions on these matters lack depth and nuance needed to address the intricate challenges posed by data security concerns. The DNA Lab Workers believe that the testimony on behalf of the State Police at the departmental hearing regarding security concerns is based on speculation and cannot be the foundation of a department's determination of operational need.

In response, the State Police present that its telework program provides that telework is a voluntary work alternative that may not be appropriate for all roles within the State Police as not all employees can perform duties remotely. It states the OFS identified Forensic Scientist as a position that cannot perform remote work without a disruption of operations within Statewide Laboratories. It has concluded that many civilian positions are not conducive to telework. It notes that accreditation of its laboratories must comply with international standards, and the primary functions of its laboratories include the scientific analysis of physical evidence, evaluation of analytical results, preparation of reports, providing expert testimony in court, providing assistance at crime scenes, providing training to law enforcement personnel regarding identification, collection, and preservation of physical evidence, and serving as a source of information relevant to criminal investigations. The State Police contends that these primary duties are not suitable for telework as these duties cannot be performed efficiently, effectively, or securely via telework. It states that

the DNA Lab Workers must have access to all necessary reference materials for their cases; they must have access to specific web-based platforms; and they must perform their duties securely, protecting the confidentiality of all victims, cases, information, evidence and data. The State Police presents that the Director had several meetings and correspondence with the State Police Chief Information Officer and it was strongly advised that the safest method of accessing evidence is directly on the instruments in the DNA Laboratory and to not use copies transferred or stored on a shared drive. It highlights that when an employee works from home, that employees has official government records which require preservation and safeguarding under State and federal law. The State Police indicates that many of the safeguards that are in place within the OFS or on government computers may not be available at one's telework site, which puts personal identifiable information and confidential case evidence at risk. It asserts that it is critical that the evidence stays within its labs as the State Police must ensure that all records are secure and not left exposed or unattended and the evidence cannot be brought to private residences and outside governmental facilities in which non-government employees or family members may access. The State Police acknowledges that during the height of COVID-19, operations were forced to a less than optimal work environment. It notes that the caseload for forensic sciences dropped by approximately 1,000 cases which is more than 50 percent of typical cases received. Further, the backlog was only reduced by 200 cases, which reflects a decrease in productivity. Therefore, it cannot compare operations during a pandemic to its current operational needs. However, the State Police presents that cases have now returned to normal volumes. It notes that the OFS receives multiple federal grants to reduce the backlog of evidence awaiting analysis. Therefore, if the State cannot demonstrate a reduction in the backlog of cases, it is at risk of losing this federal funding and future opportunities. The State Police indicates that is essential that there be no impediments to the primary responsibility of the OFS in regards to processing evidence in a timely and safe manner.

In reply, the DNA Lab Workers present that the State Police identified Forensic Scientist as one of the positions not eligible for telework. It clarifies that the DNA Lab Workers are a limited group of employees within the OFS. Further, the DNA Lab Workers assert that they are unique from other OFS labs because they can perform remote work without disruption due to the DNA Laboratory's current infrastructure and technological capabilities as demonstrated by their performance during the pandemic. The DNA Lab Workers state that the DNA Laboratory uses robotics and technologically advanced instrumentation that reduces the amount of on-site laboratory work and enables employees to collect, transmit, and reference data remotely unlike other OFS labs. Further, this enables the DNA Lab Workers to spend much of their day performing analyses, interpretation, and technical review of data and case files and preparation of reports, which is all work that can be performed safely on State-issued laptops through the secure VPN networks that are subject to State security standards. The DNA Lab Workers assert that the State Police has

provided no reason why working in the lab is safer and its safety concerns are speculative. Further, they contend that the State Police's concerns contradict how they already work as they currently access data stored on networks and not physical instruments, which is what the National Institute of Justice recommends. Moreover, their case files contain very little personal identifiable and confidential information as the files generally contain names and occasionally birth dates, but no other personal identifiable information like social security numbers. The DNA Lab Workers present that workers in other states have access to more personal identifiable information than they have; yet they are able to work remotely. Further, they present that they never remove physical evidence from a worksite location as physical evidence is stored in the lab, where custody is logged in the Laboratory Information Management Systems. The DNA Lab Workers note that even when they work from home, they are still bound by the same ethics that they have while working in the office regarding security and confidentiality concerns. They reiterate their position that they can perform at least 50 percent of their duties remotely. The DNA Lab Workers emphasize that the then-DNA Laboratory Director approved the applications for remote workers and assert that the Director is the one who knows best as to whether remote work is suitable for the DNA Lab Workers. Therefore, they contend that the State Police's denial of their application to participate in telework is an abuse of discretion. Regarding the alleged decrease in productivity, while the numbers that the State Police provide may be for all OFS laboratories, they have provided documentation that is specific to the DNA Lab Workers which shows an increase in their productivity when they were able to work remotely. They explain that the discrepancy is based on the fact that the DNA Laboratory is the only unit that is capable of truly working remotely due to the digital nature of the laboratory's data in conjunction with the State-issued laptops and secure VPN access.

In further response, the State Police highlights that the Guidelines state that "[o]perational needs are the sole discretion of the appointing authority." Further, it presents the Division of Law and Public Safety's Division of Administration, Telework Pilot Program Questions and Answers. Specifically, it provides question and answer number 13 indicates that while appointing authorities may not opt-out of having a telework program, appointing authorities may determine that certain titles are ineligible based on operational needs. The State Police contends that the risk of telework for the DNA Lab Workers outweigh the specific employee benefit. However, it highlights that the DNA Lab Workers can take advantage of the AWP as an alternative benefit.

CONCLUSION

N.J.A.C. 4A:2-3.7(b)2 provides that grievance appeals must present issues of general applicability in the interpretation of law, rule, or policy. If such issues or evidence are not fully presented, the appeal may be dismissed without further review of the merits of the appeal. *N.J.A.C.* 4A:2-3.7(f)1 provides that if that above standard is met, the employee shall have the burden of proof.

Initially, the DNA Lab Workers have presented an issue of general applicability, *i.e.* the interpretation of the Pilot Program as established in the Commission's April 6, 2022, decision, amended in its July 20, 2022 decision, and extended in its June 7, 2023 decision as their appeal represents a group of employees which could potentially impact employment Statewide. Therefore, the matter shall be reviewed. *See N.J.A.C.* 4A:2-3.7(b)2. Generally, appointing authority final determinations in grievance proceedings will not be disturbed unless there is substantial credible evidence that such determinations were motivated by invidious discrimination considerations or were in violation of Civil Service law or rules.

In this matter, the State Police denied the DNA Lab Workers from participating in the Pilot Program based on its determination of its operational needs. Upon appeal, the DNA Lab Workers claim that that they can successfully meet the State Police needs while participating in the Pilot Program, because during the height of the pandemic, they successfully worked remotely while reducing the backlog in the DNA Laboratory. Further, the DNA Lab Workers present that the Laboratory Director supports their applications for remote work, the FBI and other states allow similarly situated employees to work remotely, the DNA Laboratory has unique equipment that differentiate it from other laboratories under the OFS that allows for them to spend most of their time performing analyses without the need to be on-site in a lab, physical evidence does not leave the lab so there are no chain of custody concerns, and State-issued laptops and accessing information by using the State's secure VPN alleviate other concerns regarding security and confidentiality when working remotely. However, even assuming the accuracy of all of the above, a review of the Guidelines indicates that "[o]perational needs are the sole discretion of the appointing authority." *See e.g., In the Matter of Telework Program Complaint, Department of Children and Families* (CSC, decided February 1, 2023) *aff'd In the Matter of Telework Program Complaint, Department of Children and Families* (CSC, decided May 24, 2023). Moreover, the standard for reviewing the appeal of a denial of a grievance is not necessarily a fact-intensive inquiry that requires circumstance-specific discussion and analysis as the DNA Lab Workers argue. Instead, as indicated above, the standard is whether an appointing authority's decision was motivated by invidious discrimination or otherwise in violation of Civil Service law or rules. In this regard, the State Police has submitted legitimate business reasons as to why it decided to exclude the DNA Lab Workers from the Pilot Program, and even though the DNA Lab Workers disagree with the State Police's determination, they have not made any argument, nor have they submitted any evidence that the State Police's decision was motivated by invidious discrimination. Similarly, the DNA Lab Workers

have not submitted any persuasive argument or evidence that the State Police's determination violated any Civil Service law or rules or the Pilot Program Guidelines. As such, the DNA Lab Workers have not met their burden of proof. In other words, even if the DNA Lab Workers could "prove" that they can successfully work remotely in a secure manner without sacrificing productivity, this is not a basis to disturb the State Police's determination as there is no right to telework. Additionally, the State Police addressed this agency's concerns regarding "Equity and Accessibility" by utilizing an AWP.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
THE 13TH DAY OF SEPTEMBER, 2023

Allison Chris Myers

Allison Chris Myers
Chair/Chief Executive Officer
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Michele A. Greaves
Patricia A. Villanueva, Esq.
Alyson Gush
Division of Agency Services