



**STATE OF NEW JERSEY**

In the Matter of Telework Program  
Complaint, Department of Children  
and Families

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-2003

Reconsideration

**ISSUED: May 24, 2023 (SLK)**

The Division of Child Protection and Permanency Clerical Staff from the Communications Workers of America Local 1037 and Local 1038, represented by Patricia A. Villanueva, Esq., requests reconsideration of *In the Matter of Telework Program Complaint, Department of Children and Families* (CSC, decided February 1, 2023) where the Civil Service Commission denied its grievance concerning the exclusion of its participation in the Model Telework Pilot Program for State Executive Branch employees.

By way of background, in response to the worldwide shift to telework as a benefit to employees and in order to stay competitive in attracting top talent, in *In the Matter of Model Telework Pilot Program, State Executive Branch Employees* (CSC, decided April 6, 2022), the Commission established a Pilot Program for a period of one year, effective July 1, 2022, where such Pilot Programs may not allow for more than two days of remote work in a calendar week. The Department of Children and Families reviewed its operational needs and decided to exclude certain Clerical Staff from its Pilot Program. However, it did adopt an Alternative Work Program (AWP) which allowed staff excluded from the Pilot Program to work 35 hours over four days a week and have one day off per week. In response to the exclusion from the Pilot Program, the Clerical Staff filed a grievance, which was denied. Thereafter, the Clerical Staff filed an appeal, claiming that they had “proven” that they can successfully meet the appointing authority’s needs because, during the height of the pandemic, staff successfully worked remotely while still scheduling sufficient coverage so that certain duties that required a physical presence in the office were

completed. Upon its review, the Commission noted that a review of the Pilot Program Guidelines indicates that “[o]perational needs are the sole discretion of the appointing authority.” Moreover, the Clerical Staff had not made any argument nor had they submitted any evidence that the appointing authority’s determination was motivated by invidious discrimination considerations such as age, race or gender bias. Additionally, the Clerical Staff had not submitted any persuasive argument or evidence that the appointing authority’s determination violated Civil Service law or rules or the Pilot Program Guidelines. As such, although the Commission found that while the Clerical Staff had presented an issue of general applicability, *i.e.* the interpretation of the Pilot Program as established by the Commission, for it to review the matter, the Clerical Staff had not met the standard of proof in a grievance appeal sufficient to overturn the appointing authority’s determination.

In its request for reconsideration, the Clerical Staff asserts that the Commission made clear material error. It states that the Commission’s decision lacked discussion as to whether the decision by the appointing authority to exclude the Clerical Staff from participating in the Pilot Program was reasonable as it simply states that “operational needs are the sole discretion of the appointing authority.” The Clerical Staff states that it does not challenge the appointing authority’s authority to determine operational needs. However, it does challenge the appointing authority’s discretion. The Clerical Staff maintains that in its grievance appeal, it provided sufficient evidence from which the Commission could have determined whether the exercise of discretionary authority was reasonable given the circumstances.

The Clerical Staff claims that the appointing authority violated the Pilot Program Guidelines by not exercising its discretionary authority in a reasonable manner. It presents *In the Matter of Vey*, 124 N.J. 534, 543-44 (1991) and *In the Matter of Sykes v. N.J. Judiciary, Middlesex Vicinage*, No. 2004, 2005 WL 1794518 at \* 10 (EFPS July 12, 2005) to indicate that it is well established that administrative agencies must “articulate the standard and principles that govern their discretionary decisions in as much detail as possible.” The Clerical Staff provide that the Pilot Program’s stated goal is “a robust pilot telework program which takes into consideration operational needs while ensuring eligible employees have access to the program.” It believes that the decision to exclude Clerical Staff from the program did not reasonably take into consideration operational needs and does not ensure that eligible employees have access to the program. The Clerical Staff highlights that although the appointing authority claims that it could not be in the program because they “perform critical support functions that cannot be performed remotely,” it did not provide any evidence to support this claim. They reiterate that they provided evidence to challenge this claim, but the Commission did not address this issue. Instead, the Commission found that there is no right to telework under Civil Service law or rules. While they acknowledge that there is no right to telework, it emphasizes its argument that the appointing authority’s discretionary decision to exclude certain

employees from participating in a program generally available to others must be based on “sound discretion, guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful, but legal and regular.” *See In the Matter of Smith v. Smith*, 17 N.J. Super. 128, 132 (App. Div. 1951). They believe that because the Hudson West Local Office is still working remotely due to a building issue undermines the appointing authority’s reasonableness in using its discretion.

The Clerical Staff states that it has already met a very high burden by demonstrating that the appointing authority has acted in an unreasonable manner, because its actions are arbitrary and capricious since the decision to categorically exclude a group of employees, who have demonstrated an ability to successfully work remotely, does not address any objective need or criteria. It claims that it should not have to prove invidious motivation. However, the Clerical Staff argues that its exclusion from the Pilot Program does have a disparate impact on women as the overwhelming majority of the Clerical Staff are female and it notes that administrative and clerical work has historically been associated with and associated with woman. It claims that if the appointing authority is to categorically exclude the Clerical Staff from the Pilot Program without any legitimate justification, then any department or agency can do the same.

The Clerical Staff also argues that reconsideration is appropriate because there is a clear factual dispute requiring the development of a record at the Office of Administrative Law as the appointing authority states that there are critical support functions that it cannot perform remotely while the Clerical Staff claims that they are able to meet these critical support functions if they are permitted to participate by working remotely a maximum of two times per week. They emphasize that it submitted evidence to support its claims, such as certifications, while the appointing authority did not submit any evidence to support its claims and simply states that it has the “sole” discretion. They state “sole” discretion does not mean unfettered and unchecked. Lastly, although the decision notes that the appointing authority addressed equity and accessibility concerns by permitting excluded Clerical Staff to participate in the AWP, they claim it should not matter that Clerical Staff has access to this program if their exclusion from the Model Telework Program was an unreasonable exercise of discretion in the first place.

Although given the opportunity, the appointing authority did not respond to this request for reconsideration.

## CONCLUSION

*N.J.A.C.* 4A:2-1.6(b) provides that a petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. New evidence or additional information not presented at the original proceeding which would change the outcome of the case and reasons that such evidence was not presented at the original proceeding; or
2. That a clear material error has occurred.

*N.J.A.C.* 4A:2-1.1(d) provides that except where a hearing is required by law, this chapter or *N.J.A.C.* 4A:8, or where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record.

In this matter, the Clerical Staff failed to meet the standard for reconsideration as they have not presented new evidence that would change the outcome and they have not demonstrated that clear material error occurred. Fundamentally, the Clerical Staff has made the same argument that it submitted in the original proceeding claiming that the appointing authority abused its discretion by excluding certain Clerical Staff from the Pilot Program in an unreasonable matter. Further, the Clerical Staff believes that the Commission has made clear material error by not analyzing whether the appointing authority's discretion was exercised in a reasonable manner. It submits case law which stands for general principles of law; however, none of these cases touch on the standard of review by the Commission in a grievance appeal. However, as indicated in the prior decision, the standard for a grievance appeal is not an analysis as to whether the appointing authority's actions were "reasonable;" but rather the standard to disturbing an appointing authority's final determinations in grievance proceedings is whether there is substantial credible evidence that such determinations were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service law or rules. However, in the initial proceeding, the Clerical Staff did not make any argument that touched on this standard. Further, a review of the Pilot Program Guidelines indicates that "[o]perational needs are the sole discretion of the appointing authority." As such, the Clerical Staff had not met the standard in the original matter. Now, in its request for reconsideration, for the first time, the Clerical Staff claims that the appointing authority's exclusion of certain Clerical Staff from the Pilot Program has had a disparate impact against them since the overwhelming number of the Clerical Staff are female. However, the Commission will not determine discrimination claims unless there has been a determination of a complaint that has been first filed with an appropriate Equal Employment Opportunity and Affirmative Action officer. Therefore, if individual Clerical Staff believe that they have been subject to adverse action based on their membership in a protective class, they may file such claims under the State Policy Prohibiting Discrimination in the Workplace (State Policy) and the model procedures for internal complaints alleging discrimination in the workplace. See *N.J.A.C.* 4A:7-3.1 and 3.2.

Additionally, while the Commission will not make any determination as to whether the appointing authority's use of its discretion was "reasonable" regarding a program where the appointing authority had the "sole discretion" to determine eligibility, the record indicates, contrary to the Clerical Staff's claim, that the appointing authority made its decision to exclude certain Clerical Staff from the Pilot Program after going through an analysis of its operations and it did provide such evidence during the grievance hearing. Specifically, a review of the Hearing Officer's determination indicates that after the appointing authority reviewed its operational needs, certain Clerical Staff titles were excluded from the Pilot Program. Further, the appointing authority's Attachment "A" to its Pilot Program request presents critical functions that certain Clerical Staff titles cannot perform remotely, including receptionist, car coordinator, check printing, and other just-in-time critical services. Moreover, a certification from a Deputy Commissioner of Administration indicates that certain critical functions include, but are not limited to, providing in-person customer service to clients, visitors, local bank account custodian (e.g., signatory on payments for billable services, food, housing), managing petty cash, printing checks, car coordinator, and filing documents into case records. Additionally, Attachment "A" indicates employees in certain titles from other divisions including the Office of Education and the State Central Registry and Facilities who were also excluded from the Pilot Program and the reasons why. Further, the appointing authority indicated that it consulted with CWA and other collective negotiations units before submitting it proposed policy for review and approval by the Commission and CWA had not presented evidence to the contrary. Additionally, to address "equitable considerations" regarding ineligible employees, the appointing authority established an AWP to allow certain staff to have compressed days off per pay period by working 35 hours in a 4-day week. Finally, the Clerical Staff witnesses for the subject grievance confirmed that they were not in a position of authority to determine the appointing authority's operational needs.

Concerning the Clerical Staff's statement about an office that is working remotely due to a building issue, the Commission does not have the details regarding this circumstance. However, it is noted that this is not evidence that the appointing authority's decision to exclude certain staff from the Pilot Program is unreasonable as this is not evidence that these staff member are working in manner that the appointing authority finds best suits it needs. Instead, it appears that the appointing authority is making the best of a situation as the alternative would be to not have these employees work at all. Finally, regarding the Clerical Staff's request for a hearing, there is no basis for a hearing as there are no issues of material fact. As indicated in the Guidelines, employee participation is solely at the discretion of the appointing authority. Further, the appointing authority offered an AWP to address equitable considerations for excluded employees as directed by the Guidelines. Additionally, the Clerical Staff did not present any argument or evidence during the initial proceeding indicating that the appointing authority's decision to exclude certain Clerical Staff from the Pilot Program was based on discrimination or invidious

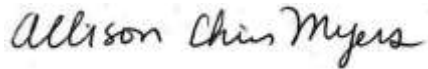
motivation or in violation of Civil Service law and rules, which is the standard for reviewing a grievance. Therefore, this matter was properly decided on the written record. *See N.J.A.C. 4A:2-1.1(d)*

**ORDER**

Therefore, it is ordered that this request 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  
CIVIL SERVICE COMMISSION ON  
THE 24<sup>TH</sup> DAY OF MAY, 2023



---

Allison Chris Myers  
Acting Chairperson  
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: George Jackson  
Patricia A. Villanueva, Esq.  
Linda Dobron  
Douglas Banks  
Division of Agency Services