



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. 2023-782

Grievance Appeal

ISSUED: February 1, 2023 (SLK)

The Division of Child Protection and Permanency Clerical Staff (Clerical Staff) from the Communications Workers of America (CWA) Local 1037 and Local 1038, represented by Patricia A. Villanueva, Esq., request that the Civil Service Commission (Commission) grant its grievance concerning the exclusion of its participation in the Pilot Program under the Model Telework Program for State Executive Branch Employees (Pilot Program).

By way of background, in response to the COVID-19 pandemic, the State predominantly shifted to telework and demonstrated that much of the State workforce could work from home. Further, 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. The Pilot Program Guidelines (Guidelines) advise that the determination of operational needs are the sole discretion of the appointing authority and such pilot programs may not allow for more than two days of remote work in a calendar week. Additionally, in *In the Matter of Model Telework Pilot Program, State Executive Branch Employees* (CSC, decided July 1, 2022), the Commission amended the Pilot Program, under the *Equity and Accessibility* section, regarding the Alternative Work Program (AWP) and Flextime.

In response to the Pilot Program, the appointing authority reviewed its operational needs and decided to exempt Clerical Staff from the Pilot Program.

However, it did adopt an 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 the subject request.

In its request, the Clerical Staff asserts that the appointing authority violated the Pilot Program by wrongfully denying them the possibility of participating in it. They present that under the Guidelines, an employee requesting to participate in the Pilot Program shall undergo a process to determine eligibility and accessibility of telework. The Clerical Staff indicates that the appointing authority failed to undergo this process and made a blanket decision by denying all Clerical Staff's inclusion in the program. They contend that if the appointing authority had completed this process for everyone, it would have found that most staff would have met the eligibility requirements as indicated in the Guidelines. The Clerical Staff lists the duties that they can perform remotely. While they acknowledge that some duties must be performed by in-person staff, they believe that their successful performance of duties during the height of the pandemic, as indicated by the praise they received from management, indicates that they can effectively work remotely. The Clerical Staff provides that during the grievance hearing, the appointing authority did not present any person of authority to testify about the department's operational needs or indicate how these needs preclude the Clerical Staff from working remotely. They believe that the appointing authority denying Clerical Staff from the Pilot Program while allowing other clerical staff to participate violates the Guidelines.

In response, the appointing authority submits the August 26, 2022, Step 2 grievance decision issued by the Hearing Officer. The summary of the presentation by management in the decision indicates that management exempted Clerical Staff, as well as employees in the Office of Education, the State Central Registry, and Facilities, based on the considerations of its operational needs where it found that staff would be needed in the office daily. It notes that under the Pilot Program, this decision is at its discretion. The appointing authority highlights that it consulted with the CWA and other collective negotiation units before submitting its proposed policy to this agency for review and approval and the CWA was fully aware of its proposed policy prior to its submission. Further, this agency approved its plan. The appointing authority also presents that it drafted an AWP after consultation with this agency to allow employees exempted from the Pilot Program to work 35 hours per week over four days and to have one day off. It states that there are many critical functions that must be done by the Clerical Staff, which was corroborated by witness testimony.

The appointing authority presents that the Hearing Officer found that it did not violate the Commission's orders, its Pilot Program policy or the parties' collective negotiations agreement by excluding the Clerical Staff from the Pilot Program. The Hearing Officer noted that under the appointing authority's policy, human resources

was not required to consult with employee supervisors to determine whether a particular position/title is suitable for telework. Further, the Hearing Officer found that the appointing authority addressed “equitable considerations” as required by the Commission’s orders by offering the aforementioned AWP for exempted employees. Finally, the Hearing Officer indicated that while the CWA presented witness testimony indicating that certain operational needs of their offices can be met by allowing clerical staff to telework, the witnesses conceded that they are not in position to determine the operational needs for the appointing authority. Among other documents, the appointing authority submits its Pilot Telework Policy, which indicates that Clerical Staff titles are excluded from the Pilot Program because these staff perform critical support functions that cannot be performed remotely, including receptionist, car coordinator, check printing, and other just in time critical services.

In reply, the Clerical Staff quote the Commission’s April 6, 2022, decision which established the Pilot Program where appointing authorities were directed to “institute a robust telework program which takes into consideration operational needs while ensuring eligible employees have access to the program” and “provide minimum standards for appointing authorities in crafting internal telework policies to support and implement this pilot program.” Further, they present that the Commission directs that “[e]mployees and appointing authorities shall undergo a process to determine eligibility and accessibility of telework.” Additionally, the Guidelines indicate that “generally, positions suitable for telework include positions with duties that are portable and can be performed effectively and efficiently outside the Official Reporting Location.” They also state that the Guidelines establish a process for employees and appointing authorities to determine eligibility for participation in the program.

The Clerical Staff asserts that the appointing authority refused to undergo this process by unilaterally and categorically excluding dozens of titles from participating in the Pilot Program. They contend that there is ample evidence to demonstrate that the Clerical Staff can perform their jobs remotely and should be eligible to participate in the Pilot Program. The Clerical Staff highlights that during the height of the pandemic, office supervisors created remote work schedules which also provided sufficient office coverage. They present supervisors who were commended for their management of telework staff during the pandemic. The Clerical Staff indicates that even if all duties cannot be performed remotely, this is not required under the Guidelines as managers have the right to call staff into the office as needed to perform duties that require a physical presence. They note that under the Guidelines, staff will only be working at home two days per week and there will never be a day when there is no physical Clerical Staff in the office to perform duties that require a physical presence.

The Clerical Staff asserts that it is undisputed that they performed their jobs well when working remotely during the height of the pandemic. While they

acknowledge that the Guidelines indicate that “operational needs are the sole discretion of the appointing authority,” they present case law that provides that this discretion may not be exercised in an unreasonable manner. The Clerical Staff argues that the appointing authority cannot claim that its exclusion from the Pilot Program was reasonable as they already have proven that they can successfully work remotely, including maintaining schedules that provided for sufficient office coverage so that the duties that requires a physical presence in the office were performed while other clerical duties were being performed remotely at the same time. It reiterates that sufficient coverage can be maintained if the Clerical Staff is permitted to work remotely for a maximum of two days per week.

The Clerical Staff states that the appointing authority has not elaborated what operational needs cannot be met if they are permitted to telework twice a week. They enclose certifications from certain Clerical Staff which describes the type, amount and frequency of work that is demanded of them to demonstrate that they can meet the appointing authority’s operational needs if they are permitted to telework twice a week. The Clerical Staff also submits other documentation to show that they were successfully able to meet the appointing authority’s needs while some staff worked remotely as others were scheduled to work in the office to preform duties that required a physical office presence. They request to be permitted to apply for the Pilot Program. Further, the Clerical Staff believes that there should be consultation between Human Resources and the employees’ supervisors to confirm that they are eligible to participate in the Pilot Program based on the criteria set by the Commission. In the event of an employee being denied, they request that the employee’s supervisor explain in writing which eligibility criteria that the employee cannot meet.

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 and the Commission’s decision will be a final administrative action.

N.J.A.C. 4A:2-3.7(f)1 provides that in Commission reviews, the employee shall present issues of general applicability in the interpretation of law, rule, or policy. If that standard is met in grievance matter, the employee shall have the burden of proof.

Initially, the Commission finds that the Clerical Staff has presented an issue of general applicability, *i.e.* the interpretation of the Pilot Program as established in the Commission’s April 6, 2022, decision and amended in its July 20, 2022 decision. Therefore, the Commission shall review the matter. *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 such as age, race or gender bias or were in violation of Civil Service law or rules.

In this matter, the appointing authority denied the Clerical Staff from participating in the Pilot Program based on its determination of its operational needs. Upon appeal, the Clerical Staff claims that it has “proven” that they can successfully meet the appointing authority’s needs, because during the height of the pandemic, staff successfully worked remotely performing while still scheduling sufficient coverage so that certain duties that required a physical presence in the office were completed. They claim that since an employee would only be allowed to work remotely twice a week, there will be sufficient coverage each day of the week to perform the duties that require a physical presence. They submit certifications, performance evaluations, and other documentation to support their claims. However, a review of the Guidelines indicates that “[o]perational needs are the sole discretion of the appointing authority.” Moreover, the Clerical Staff has not made any argument nor has it 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 has not submitted any persuasive argument or evidence that the appointing authority’s determination violated any Civil Service law or rules of the Pilot Program Guidelines. As such, the Clerical Staff has not met the standard in a grievance appeal. In other words, even if the Clerical Staff could “prove” that it can successfully work remotely while still performing the duties that require a physical presence in the office, this is not a basis to disturb the appointing authority’s determination as there is no right to telework under the Commission’s decisions or other Civil Service law or rule. Additionally, the appointing authority addressed this agency’s concerns regarding “Equity and Accessibility” by creating an AWP for employees who were denied participation in the Pilot Program by allowing such employees to work 35 hours per week over four days and to have one day off.

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 1ST DAY OF FEBRUARY, 2023

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