BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 20-10**
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MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
	*	
EMPLOYER	*	
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FINAL DECISION

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the appeal of [redacted] (Appellant).

BACKGROUND

On January 16, 2020, the Department of Health and Human Services (DHHS or Department) issued an amended Notice of Termination to Appellant. County Exhibit (CX) 11; Appellant Exhibit (AX) 10. On February 3, 2020, Appellant filed this appeal with the Board challenging the decision of the Department to terminate her from her position as a Grade 23 Planning Specialist III.

The County filed its prehearing submission on March 3, 2020, and Appellant filed her prehearing submission on April 9, 2020. On May 26, 2020, the parties appeared before the Board for a prehearing video conference. At the prehearing conference the issues to be decided were identified, the Board ruled on proposed witnesses and exhibits, and a date for the merits hearing was established. The parties indicated that they might be able to stipulate to material facts and file cross motions for summary decision in lieu of a hearing on the merits. The parties were given deadlines to submit stipulations of fact, a proposed briefing schedule for cross motions for summary decision, and to advise the Board on the status of settlement negotiations. A prehearing order was issued on May 27, 2020.

On July 6, 2020, the parties filed a pleading titled Joint Stipulations, Request to Hold Hearing in Abeyance in Lieu of Cross-Motions for Summary Decision, and Proposed Briefing Schedule. The pleading asserted that the material facts were not in dispute and they jointly requested that the hearing be held in abeyance while they submit, and the Board considered, cross-motions for summary decision. The Board granted the joint motion on July 8, 2020, postponing and holding the hearing in abeyance until the Board reviewed and ruled on the cross-motions for summary decision.

The parties filed cross motions for summary decision on October 12, 2020 (County) and October 13, 2020 (Appellant),[1] and oppositions to the opposing party's cross-motion for summary decision on October 26, 2020.

After reviewing the cross-motions for summary decision of the parties and the exhibits in the record Board members Harriet E. Davidson and Sonya E. Chiles considered and decided the appeal for the Board.[2]

FINDINGS OF FACT

The parties agree that the material facts are undisputed. On July 6, 2020, the parties filed Joint Stipulations to the following facts:

1. Ms. [redacted] was a Planning Specialist III within Montgomery County Health and Human Services, working as a SAS[3] programmer and reporting to Dr. [redacted].[4]
2. Ms. [redacted] requested as an accommodation under the Americans with Disabilities act to be given a new supervisor on the basis that she has a disability, which prevented her from performing the essential functions of her job only while reporting to Dr. L[redacted].
3. The County did not place her with a new supervisor, but provided her with a 90 day period of priority consideration for any vacancy for which she met the minimum qualifications, and advised her that if she failed to obtain another position within the County she would be terminated.
4. Ms. [redacted] did not apply to any positions and was thereafter terminated.

The Board has carefully reviewed the record and has made the following additional findings of fact.

Appellant was diagnosed with generalized anxiety disorder by Dr. [redacted] W[redacted], a psychiatrist. On June 9, 2018, Appellant submitted the medical certification for Family Medical Leave Act (FMLA) qualified leave. AX 18; CX 14. Appellant requested and was apparently granted FMLA leave from May 23, 2018, to August 23, 2018. AX 18; CX 14; Appellant's Motion for Summary Judgment, pp. 1-2.

[1] Appellant's pleading is titled Motion for Summary Judgment.
[2] Board Member Angela Franco did not participate in the consideration of this decision.
[3] SAS is a statistical software, sometimes referred to as Statistical Analysis System.
[4] Dr. L[redacted] (Dr. L) is the Chief Epidemiologist at DHHS.

Dr. [redacted] S[redacted] (Dr. S), the lead physician for the County's Occupational Medical Services (OMS), examined Appellant on August 27, 2018, and found no significant medical impairment. AX 8.

Appellant saw Dr. S again on November 13, 2018, and he issued a Health Status Report indicating that she could return to work on November 26, 2018, "however cannot return to current office." Dr. S recommended that Appellant receive the temporary accommodation of placement in a different office. AX 8; CX 3.

After a December 17, 2018, follow up visit Dr. S issued a Health Status Report finding that Appellant was "not able to resume original position. Reasonably accommodate or follow admin. [administrative] process." AX 8; CX 4. On December 18, 2018, Appellant was placed in a temporary light duty assignment reporting to M[redacted] H[redacted] (MH), the Special Assistant to the Chief Operating Officer of DHHS. AX 3; CX 5.

While assigned to MH, Appellant worked on various matters which included new tasks in addition to tasks which were the essential job functions and responsibilities of a Planning Specialist III position, *i.e.*, her position. A. Decl. at ¶ 4.

After that assignment ended on May 31, 2019, Appellant was advised by a memorandum dated June 17 from the Acting Director of DHHS that she could use the 90-day priority consideration process to be considered for other vacant, funded positions for which she was qualified. AX 3; CX 5. The June 17 memorandum also advised Appellant that the assignment to report to MH had been a temporary light duty assignment and that the duties performed by Appellant during that time were "incompatible with [Appellant's] ability to perform the essential functions of the Planning Specialist III position" she held. The June 17 memorandum further advised Appellant that if she did not obtain another position in 90 days, she would be terminated. AX 3; CX 5.

On June 25, 2019, the Disability Manager emailed Appellant with information concerning the priority consideration process and asked Appellant to let her know if any assistance was needed. CX 12. Appellant said that she would contact the Disability Manager if she needed help. CX 12.

Around July 10, 2019, Appellant had an email exchange with MH where he recommended that she contact the DHHS Human Resources Manager, "to see what available position could be a good fit for her." AX 15; CX 9; Appellant's Motion for Summary Judgment, p. 3. According to Appellant, "Unfortunately, there weren't any available positions that matched [Appellant's] skills." AX 15; CX 9. Appellant "continued to search the available positions." AX 15; CX 9; Appellant's Motion for Summary Judgment, p. 3.

During the 90-day period of priority consideration there were at least two positions that DHHS identified for Appellant's consideration, including one recommended to her by MH. CX 11, p. 4. One position was a Program Manager I, Grade 23 (IRC38767). CX 18. That position was posted on July 15, 2019, with a closing date of August 7, 2019. CX 18.[5] Appellant did not apply for that position. Another Program Manager I, Grade 23 (IRC39127), was posted from August 15,

[5] The January 16, 2020, Notice of Termination - Amended erroneously states that the posting for the position closed on August 6. AX 10; CX 11.

2019, to August 29, 2019. CX 19. Appellant did not apply for that position either. Furthermore, Appellant did not apply for any available positions. Joint Stipulation 4.

After the 90-day priority consideration period expired on September 17, the DHHS Director sent Appellant a Notice of Proposed Termination dated September 20, 2019. CX 8; AX 9. By memorandum dated October 15, 2019, Appellant responded to the Department via her attorney. CX 9; AX 15.

On October 22, 2019, Appellant filed a grievance dated October 16, 2019, alleging that DHHS had failed to reasonably accommodate her and requesting that she be allowed to meet with the Disability Program Manager to identify "Reasonable Accommodations/Reassignment" and priority consideration if necessary. AX 19; CX 15.

On October 21, 2019, the Disability Program Manager unsuccessfully attempted to contact Appellant and her union representative but received no response. CX 10, 20. The Disability Program Manager then asked the OMS Nurse Manager to contact Appellant regarding a reevaluation of the Health Status Report. On November 5, 2019, the Nurse Manager emailed the Disability Program Manager advising that she had reached out to Appellant who responded by saying that "I don't have any reason to go to OMS." *Id.*

The DHHS Director issued a grievance decision dated November 12, 2019. AX 20; CX 16. The decision did not rescind the June 2019 Follow Up to Most Recent Health Status Report, but held the notice of proposed termination in abeyance so that Appellant could meet with the Disability Program Manager to evaluate whether Appellant could perform the essential functions of her position. That meeting was to take place within 5 workdays. *Id*.

Appellant met with the Disability manager about ten days later. Paragraph 13 of Appellant's sworn Declaration of October 13, 2020, avers that on November 22, 2019, "I told [the Disability Program Manager] that my situation had not changed and that I could perform the essential functions of my job but I needed a different supervisor."

In a November 25, 2019, email to the Disability Manager Appellant reiterated that she just needed a change of supervisor. CX 17; AX 21. The Appeal Form filed by Appellant in this case states that Appellant "suffered from extreme anxiety, stress and depression and while she could perform the essential functions of her position, she could not do so under [Dr. L's] supervision." The same assertion was made in Appellant's October 15, 2019, response to the Notice of Termination. CX 9; AX 15.

On January 16, 2020, Appellant was issued a Notice of Termination - Amended because she did not find a position within the 90-day priority placement period. CX 11; AX 10. *See* CX 6.

APPLICABLE LAW

Montgomery County Personnel Regulations, § 1, Definitions (as amended March 5, 2002, October 22, 2002, December 10, 2002, March 4, 2003, April 8, 2003, October 21, 2008, November 3, 2009, May 20, 2010, February 8, 2011, July 12, 2011, December 11, 2012, February 23, 2016, July 17, 2018 and June 1, 2020)

> **§ 1-58. Priority consideration:** Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion.

§ 1-59. Priority eligible list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position.

Montgomery County Personnel Regulations, § 6, Recruitment and Application Rating Procedures (as amended January 18, 2005, July 31, 2007, October 21, 2008, July 20, 2010 July 12, 2011, July 24, 2012, December 11, 2012, June 25, 2013, June 30, 2015, February 2, 2016, and February 23, 2016)

§ 6-10. Priority eligible list.

(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who:

(1) is unable to perform the employee's job because of a disability or injury under the ADA; . . .

Montgomery County Personnel Regulations, § 8, Medical Examinations and Reasonable Accommodation, (as amended October 22, 2002, December 11, 2007, October 21, 2008, July 24, 2012, and June 30, 2015)

§ 8-7. Required medical examinations of employees; actions based on results of required medical examinations.

(g) ***Application of ADA and reasonable accommodation.***

(4) The department director must first try to reasonably accommodate an employee with a disability in the employee's current job unless the OHR Director determines that accommodation in the current job would impose an undue hardship on the County. . .

(5) If the employee is an individual with a disability who cannot perform the essential functions of the current job with or without accommodation or if accommodation would impose an undue hardship on the County, the department director may:

(A) reassign the employee through a voluntary transfer or demotion to a vacant position for which the employee is qualified, with essential duties that the employee can perform with or without accommodation; or

(B) terminate the employee's County employment, if the employee is not reassigned to a vacant position.

(h) ***Light duty evaluation; duration of light duty assignment.***

(2) ***Duration of light duty assignment.*** A department director must not allow an employee's light duty assignment to last longer than 6 months.

Montgomery County Personnel Regulations, § 29, Termination, (as amended October 21, 2008)

§ 29-2. Reasons for termination.

(a) A department director may terminate the employment of an employee: . . .

(9) who has an impairment not susceptible to resolution that causes the employee to be unable to perform the essential functions of the employee's job; . . .

(c) A department director must not terminate a qualified employee with a physical or mental disability under 29-2(a)(9) above unless efforts at reasonable accommodation as described in Section 8 of these Regulations are unsuccessful.

Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO),

APPENDIX VIII – REASONABLE ACCOMMODATION

2.4 Priority Consideration - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. Employees will be entitled to priority consideration for vacancies in the same branch of government to which they are assigned. . .

2.6 Reassignment - Placement of an employee with a disability in a different vacant position for which the employee is qualified and can perform the essential functions of the new position. . .

2.9 Special Eligible List - An eligible list which sets forth employees who will receive priority consideration for a vacancy as defined in Section 5-11 of the Personnel Regulations and 2.4 of this procedure. . .

4.3 When an employee needs reassignment as an accommodation for a disability, a maximum of 90 days will be allocated to secure a placement. Priority consideration will be given for any position for which the person qualifies. If it is determined that reasonable accommodation cannot be made, request the employee's department to initiate a disability retirement application.

ISSUE

Was Appellant's termination consistent with law and regulation and otherwise appropriate?

ANALYSIS AND CONCLUSIONS

The Montgomery County Code, Administrative Procedures Act, § 2A-7(d), provides that a motion for summary decision may be granted if the Board finds that: "(1) there is no genuine issue of material fact to be decided at the hearing; and (2) the moving party is entitled to prevail as a matter of law." The Board has carefully reviewed the record and the cross motions for summary decision and concludes that there are no genuine issues of material fact that are in dispute and to be decided. Accordingly, we find that summary decision is appropriate.

Appellant was diagnosed with a generalized anxiety disorder by her psychiatrist in June 2018. She was granted several months of FMLA leave and then saw Dr. S for return to work evaluations. In November and December 2018 Dr. S concluded that she could return to work, but not back into the office supervised by Dr. L.

In contrast to MSPB Case No. 18-27 (December 29, 2020), here the County bent over backwards in an effort to accommodate Appellant by immediately providing her with a temporary light duty assignment that was not under the supervision of Dr. L. When the temporary assignment ended under the authority of MCPR § 8-7(h), Appellant was granted priority consideration.

The ADA requires that an employer and a qualified individual with a disability engage in an interactive process in order to arrive at a reasonable accommodation. The reasonable accommodation interactive process requires both the employer and employee to work cooperatively to enhance the probability of success. EEOC Enforcement Guidance, Question 9 ("as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability."). The evidence of record does not suggest that Appellant cooperatively participated in the interactive process. Rather, it appears she insisted that the only accommodation she would accept was to work for a supervisor other than Dr. L. Before and during her time on priority consideration she did not seek or indicate interest in any vacant positions for which she was qualified. Instead, she suggested that her temporary assignment working for MH should be made permanent or that her position have a different supervisor.

Despite Appellant's insistence that due to anxiety, stress, and depression she needed a change of supervisor, (CX 9, CX 17; AX 15, AX 21), it is undisputed that Appellant failed to apply for any available positions. Joint Stipulation 4. At least two appropriate Program Manager I, Grade 23 positions were available and posted in July and August 2019, while Appellant was on priority consideration. CX18, CX19. Significantly, MH advised Appellant about one of those vacant positions at Appellant's grade level and encouraged Appellant to apply. CX 11, 16, 18. Appellant did not apply for either position. CX 11; CX 18; CX 19. Essentially, Appellant refused to consider at least two reasonable accommodations involving reassignments during the time she was on priority consideration. This would have given her a new supervisor, which she was seeking, and address her mental health issues.

Priority consideration allows certain qualified individuals with disabilities to be considered before other candidates for any available position for which they are qualified and can perform the essential functions of the job, with or without reasonable accommodation. MSPB Case No. 18-27 (2020). *See* Collective Bargaining Agreement between the County and the United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (MCGEO), Appendix VIII, ("**2.4 Priority Consideration** - Refers to the right of all qualified employees with disabilities in need of reassignment to be considered for vacancies at or below the grade they hold. Such employees who apply for any vacancy at or below their grade level will be placed on a special eligible list for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means. . ."). CX 6; AX 4.[6]

[6] *See* Montgomery County Personnel Regulations (MCPR), §1-58, ("Priority consideration: Consideration of a candidate for appointment, reassignment, or promotion to a vacant position before others are considered. It does not guarantee that the candidate will be selected for appointment, reassignment, or promotion."); §1-59, ("Priority eligible list: The official list of applicants who have priority consideration and are eligible for reassignment or reemployment to a vacant position."); MCPR, § 6-10 ("(a) The OHR Director must establish a priority eligible list to provide priority consideration in the following order to an employee who: (1) is unable to perform the employee's job because of a disability or injury under the ADA;").

Because Appellant was on priority consideration, had she applied for either of the two Program Manager I positions it is likely she would have been selected and reassigned to a comparable position with a new supervisor. There is nothing in the record to suggest otherwise.

Appellant argues that she was capable of performing the essential functions of her position but, because of a general anxiety disorder, not for a specific supervisor. Appellant suggests that the County should have created a position for her under the supervision of MH and that the failure to do so was a refusal to provide her with an accommodation. Appellant's Motion for Summary Judgment, p. 14.

Appellant's desire for a specific accommodation does not create a legal obligation for the County to provide her with the preferred accommodation. The County is required to provide a reasonable accommodation to a qualified individual with a disability, but not necessarily the specific accommodation requested. *Peninsula Regional Medical Center v. Adkins*, 448 Md. 197, 237 (2016) ("an employer must only provide a reasonable accommodation and not the accommodation of the employee's choice."); *Reyazuddin v. Montgomery County*, 789 F.3d 407, 415-16 (4th Cir. 2015) ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."); MSPB Case No. 18-27 (2020).

While the County was not obligated to reassign Appellant to a position under another supervisor, it nevertheless attempted to provide that accommodation. EEOC *Enforcement Guidance*, Question 33 ("Does an employer have to change a person's supervisor as a form of reasonable accommodation? No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so."). CX 13.

Moreover, the County was certainly not obligated to create a new permanent position as an accommodation for Appellant, even though that appeared to be her preference. *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) ("The ADA does not require an employer to create a new position in order to accommodate an employee with a disability, or transform a temporary light duty position into a permanent position. *Buskirk*, 307 F.3d at 169. . . or if to do so would conflict with seniority rules, *see US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)").

We have no difficulty concluding that the County met its reasonable accommodation obligations under the ADA by engaging in an interactive process designed to find and possibly reassign her to a vacant, funded position. Appellant's refusal to apply for any of the identified positions does not render the County's efforts improper. Indeed, Appellant's failure to apply for a position may be considered a failure to participate in the interactive process. *See Wehner v. Best Buy Stores, L.P.*, 2017 U.S. Dist. LEXIS 34349, at *25-26 (D. Md. 2017) (Where employer was on notice employee wanted a specific position "A reasonable jury could find that [the employee] failed to fulfill his role in the interactive process by not applying for the position, since he obviously knew how to do so."). *See Elledge v. Lowe's Home Ctrs., LLC,* 2020 U.S. App. LEXIS 36236 at *30; __ F.3d __; 2020 WL 6750363 (4th Cir. 2020) (no violation of the ADA to terminate employee who declined to apply for reassignment); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177 (10th Cir. 1999) ("If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments. . . Once the employer has offered such a reassignment, its duties have been discharged."); EEOC Enforcement Guidance, Question 28

("When an employer has identified any vacancies . . . notified the employee, and . . . offered an appropriate vacancy to the employee . . . the employer will have fulfilled its obligation.").

It is undisputed that Appellant was unable to perform the essential duties of her position under the supervision of Dr. L. Appellant stipulated that she "requested as an accommodation under the Americans with Disabilities act to be given a new supervisor on the basis that she has a disability, which prevented her from performing the essential functions of her job only while reporting to Dr. [L]." Joint Stipulation 2. Appellant's position on this point has been consistent. For example, the Appeal Form filed by Appellant to initiate this case states that while she "could perform the essential functions of her position, she could not do so under [Dr. L's] supervision." Appellant told the Disability Program Manager that she "could perform the essential functions of my job but I needed a different supervisor." Appellant's Declaration ¶13. The same assertion was made in Appellant's October 15, 2019, response to the Notice of Termination. CX 9; AX 15.[7]

If Appellant cannot perform the essential functions of her position under the supervision of Dr. L, and he is the supervisor of the position she held, then she admits that she was unable to perform the essential functions of her job. Given Appellant's admission, her refusal to cooperate with the County's efforts to find her a position with a different supervisor is inexplicable.

We also find unpersuasive Appellant's suggestion that the temporary light duty assignment working with MH somehow shows that the County should have accommodated her by making the assignment permanent. The County did not permanently change the essential functions of Appellant's position by giving her a temporary assignment. *Laurin v. Providence Hosp.*, 150 F.3d 52, 60-61 (1st Cir.1998) ("An employer does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous."); *Howell v. Holland*, 2014 U.S. Dist. LEXIS 182306, at *30-31 (D.S.C. 2014) ("simply because an employer chooses to temporarily accommodate an employee with a disability by eliminating essential duties, the employer may not be required to continue such an accommodation permanently. . .").

We find that because Appellant was unable to perform the essential functions of her position and was unable or unwilling to locate and qualify for another County position at her grade level or below while on priority consideration, the County could properly subject her to termination. MCPR, § 29-2 ("(a) A department director may terminate the employment of an employee: . . . (9) who has an impairment not susceptible to resolution that causes the employee

[7] We need not address whether the County could have taken the position that Appellant's inability to tolerate working for Dr. L was not a disability. *Lewis v. Baltimore City Board of School Commissioners*, 187 F. Supp. 3d 588, 598 (D. Md. 2016) ("not being able to work with a particular supervisor does not qualify as a disability under the ADA."); *Summers v. Target Corp*., 382 F. Supp. 3d 842, 848-50 (E.D. Wis. 2019) ("the fact that the plaintiff is unable to work for a particular supervisor, whether because of anxiety or extreme dislike, is not a disability within the meaning of the ADA. . . The failure to assign or transfer an employee to work under a different supervisor does not violate the reasonable accommodation requirement of the ADA when the employee's disability is specifically tied to a particular supervisor and the employee's ability to work is inhibited only in connection with working for that supervisor."). *See Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3rd Cir. 1998) (request to be transferred from an individual causing employee stress is unreasonable as a matter of law under the ADA). *See also Lang v. Wal-Mart Stores East, L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) (employer not required to exempt an employee from an essential job function as an accommodation).

to be unable to perform the essential functions of the employee's job;"); MCGEO agreement, Appendix VIII, § 4.3. CX 6; AX 4.

Accordingly, we conclude that there are no genuine issues of material fact and that the termination of Appellant was appropriate and consistent with law.

ORDER

For the foregoing reasons, the Board finds that a hearing is unnecessary, **GRANTS** the County's motion for summary decision, and **DENIES** Appellant's motion for summary decision and the appeal of her termination.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
December 30, 2020

[redacted]
Harriet E. Davidson
Chair