



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of L.W., Department of Human Services

CSC Docket No. 2016-1697

Discrimination Appeal

ISSUED: NOV 30 2016 (CSM)

L.W., a Personnel Assistant 1 with the Department of Human Services (Human Services), appeals the determination of the Acting Commissioner, Department of Human Services, that the appellant did not present sufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, an African-American female, filed a complaint with Human Services' Equal Employment Opportunity Office (EEO) alleging that she was denied differential pay for serving in an acting capacity, but in 2013, a non-black employee received differential pay for serving in an acting capacity. The appellant also claimed that she was denied a promotion to Manager 1, Human Resources in favor of a non-black, less qualified employee. The EEO investigated the matters, which included interviewing witnesses and reviewing documentation, and found that effective August 8, 2012, the State no longer compensates employees for serving in an acting capacity and that the differential payment to the individual the appellant named was for service rendered prior to August 8, 2012. Further, the investigation found that the appellant did not serve in an acting capacity from March 1, 2013 to March 14, 2014. With respect to the promotion to Manager 1, Human Resources, the investigation found that the individual who was promoted was appointed from an existing eligible list in her unit scope and therefore, the position was not externally posted.

On appeal, the appellant states that it has been the appointing authority's practice not to compensate employees for acting service unless it is within the

current fiscal year. Thus, since the individual the appellant named received payment for acting service beyond the fiscal year in which it occurred, the appellant requests that she be compensated based upon the “pliability” in which the appointing authority rewarded that individual. The appellant also provides an e-mail dated March 1, 2013, where a then Deputy Commissioner indicated that the appellant would “continue to manage the Central Office Human Resource personnel actions and management requests.” Additionally, the appellant states that she was not selected for a Manager 1, Human Resources position, but asserts that she still performed those duties up until the closure of the North Jersey Developmental Center almost one year later. Further, the appellant does not dispute that the individual who was promoted to Manager 1, Human Resources should be promoted, but only requests that she be promoted to the management series since she performs equivalent duties.

In response, the EEO states that the State discontinued awarding Lump Sums for service in an acting capacity effective August 8, 2012. Thus, she could not be compensated for any asserted acting service performed between March 1, 2013 and March 14, 2014. The acting service performed by the individual named by the appellant occurred in 2011 prior to the discontinuation of the payment policy in 2012. Regardless, the investigation found that the duties performed by the appellant were those consistent with her permanent title of Personnel Assistant 1. With respect to the promotion to Manager 1, Human Resources, while the appellant contends she was performing equivalent duties to the individual who was appointed, as stated above, the investigation found that she was performing work consistent with her permanent title of Personnel Assistant 1. Further, the appellant worked in a different unit scope than the individual she names and it was not posted externally since there was a promotional eligible list in existence.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that under the State Policy, discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. *N.J.A.C.* 4A:7-3.1(a)2 provides that the State Policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above that is not directed at an individual but exists in the workplace and interferes with an individual’s ability to do his or her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by the policy. Additionally, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C.* 4A:7-3.2(m)(3).

The Commission has conducted a review of the record and finds that the appellant has not established that she was subjected to discrimination in violation of the State Policy. The investigation found that the State discontinued awarding differential pay for acting service on August 8, 2012 and that the appellant asserted that she performed acting duties between March 1, 2013 and March 14, 2014. Thus, even assuming she performed the acting duties during this period, she could not be awarded differential pay. Regardless, the investigation found that she was performing duties consistent with her permanent title of Personnel Assistant 1. Additionally, it must be emphasized that here is no such designation as an "acting" appointment under Civil Service rules for titles within the career service. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. See *In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Out-of-title work undermines the State Classification plan and creates salary inequities. In this regard, there is a readily available process for State employees to present out-of-title work concerns by filing a classification appeal with this agency. It is clearly not appropriate for State agencies and/or employees to work out-of-title and then seek compensation for such improper work. Thus, there was no statutory or other entitlement to lump sum payments for asserted service in an acting capacity absent a finding in a classification appeal that the position at issue should be reclassified as a different title. See *In the Matter of Eileen Crummy, et al.* (Commissioner of Personnel, decided May 31, 1991).

In the same vein, while the appellant may feel she is performing duties at a level equivalent to that of Manager 1, Human Resources, it has been well established that the fact that some of an employee's assigned duties may compare favorably with some examples of work found in a given job specification is not determinative for classification purposes, since, by nature, examples of work are utilized for illustrative purposes only. Moreover, it is not uncommon for an employee to perform some duties which are above or below the level of work which is ordinarily performed. For purposes of determining the appropriate level within a given class, and for overall job specification purposes, in classification reviews, the definition portion of the job specification is appropriately utilized. The only manner in which it can be established that an incumbent in a position is performing higher or lower level duties is by filing a classification appeal in accordance with *N.J.A.C. 4A:3-3.9(c)*. In this case, other than her assertion that she is performing equivalent duties to those of a Manager 1, Human Resources, the appellant has provided no documentation that her position should be reclassified to that title. Therefore, the appellant has not established that the appointing authority violated the State Policy because it has not promoted her to Manager 1, Human Resources.

Accordingly, the Commission finds that the EEO's investigation was thorough and impartial, and the record does not support a finding that there was a

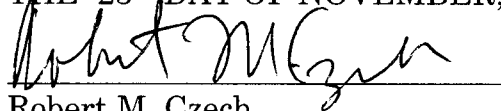
violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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
CIVIL SERVICE COMMISSION ON
THE 23rd DAY OF NOVEMBER, 2016



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