



STATE OF NEW JERSEY

In the Matter of L.H.
Department of Corrections

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

CSC Docket Nos. 2017-1972 and
2017-4004

Minor Discipline Appeal and
Discrimination Appeal

ISSUED: APRIL 9, 2018 (SLK)

L.H. a Senior Correction Officer with the Department of Corrections (DOC), represented by Beth White, Esq., appeals her Official Written Reprimand and the decision of the Director, Equal Employment Division (EED), which did not substantiate her allegations to support a finding that she had been subject to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). These appeals have been consolidated due to common issues presented.

By way of background, the appellant, a Senior Correction Officer and African-American female, was assigned to the DOC Training Academy as an instructor. On March 11, 2014, she told Correction Lieutenant R.V. (R.V), a Hispanic male, that five African-American Trainees complained about how they were directed to wear their hair and they were subjected to additional physical exercise because of their hair. L.H. claimed that in response, R.V. yelled at her and belittled her in front of co-workers and she thereafter was subjected to constant harassment and discrimination. On March 29, 2016, the appellant failed to provide a report as ordered by R.V. explaining the method she used to remediate trainees after she requested that R.V. provide her with a test binder and R.V. refused as the test binder was not one of the materials listed to be used for remediation training. L.H. believed that R.V.'s treatment was harassment and she informed R.V. that she was going to file a complaint against him. L.H.'s complaint alleged that R.V. subjected her to a number of specific incidents of harassment and discrimination following the March 2014 event due to her age, color and sex/gender and was received by the EED

on April 4, 2016. On that same day, the appellant was informed that she was being investigated for insubordination regarding the March 29 incident. Subsequently, on April 21, 2016, as L.H. still had not provided R.V. the report that he ordered, a Notification of Minor Discipline for insubordination was issued against her. After a Department Hearing, the insubordination charge was sustained and she was issued a five working day suspension. Thereafter, the appellant appealed the matter to a Joint Union Management Panel (JUMP). The panel consisted of one person selected by her union, one person selected by the State, and a third-party neutral mutually selected by both parties. JUMP modified the penalty to an Official Written Reprimand with no back pay and indicated that L.H. could not apply to a specialized unit for one year from the date of the incident.

As part of the EED's investigation, L.H. identified five individuals, along with other instructors as witnesses. The investigation included interviews of 14 witnesses, including four of the witnesses that L.H. named, seven instructors, and three randomly selected witnesses as having information relevant to the allegations. Additionally, R.V. was interviewed and he denied the allegations against him. One of L.H.'s named witnesses, former PBA President L.L., was not interviewed because he did not observe any of the alleged adverse acts. Moreover, the EED collected and reviewed a substantial amount of pertinent evidence, including documents and department policies. The EED's investigation was unable to substantiate the allegations.

On appeal, with respect to the March 29, 2016 incident, L.H. explains that she needed to review the test binder to know specifically what areas to cover with the trainees. As such, she asked R.V. for the test binder and he responded that she was not to use the binder for remediations. Then, R.V. asked her to explain how she does remediations and allegedly started getting hostile with her. R.V. then ordered her to write a special custody report about how she conducts remediations. L.H. asked to speak with the Director and told R.V. that she would be filing a harassment complaint against him. L.H. e-mailed the Director, but did not speak with him as he did not come in. She did complete the report, but did not turn it in to R.V. as she intended to give it to the Director. That same day, L.H. completed a State Policy complaint against R.V. on the basis of age, race, and sex/gender and her complaint was received by EED on April 4, 2016. On the same day, she indicates that she was questioned regarding insubordination. L.H. claims that her union representative advised her that a deal was offered to withdraw the charges against her if she agreed to withdraw her EED complaint. L.H. asserts that this offer proves that the charges against her were frivolous and were in retaliation for her State Policy complaint. L.H. did not make that deal and was charged with insubordination and given a five-day working suspension. L.H. indicates that she learned in December 2016 that her matter was heard by JUMP on November 16, 2016; however, she was not given any notice of the hearing or the decision.

In reference to the EED investigation, L.H. asserts that, contrary to the EED's determination, the disciplinary charges were started after she refused to withdraw her EED complaint. L.H. complains that she filed the EED complaint in April 2016 and the determination letter was not issued until May 2017. Therefore, L.H. asserts that the time to complete the investigation was excessive and that all her witnesses should have been interviewed. Specifically, the appellant questions why L.L. was not interviewed as he had relevant information that was not disclosed. Additionally, L.H. presents that she provided the names of female trainee witnesses, but they were not interviewed. L.H. states that she alleged age discrimination because she heard on several occasions that "we need more young people down here." L.H. presents that several African-American female trainee recruits believed they were being harassed about their hair and given additional exercises due to their hair and, when she reported this to R.V., she started being harassed on multiple occasions. L.H. describes various harassing incidents including being removed from instructing classes, no longer being allowed to attend employee related conferences where she previously had been approved, and given unfavorable assignments. She requests either that the charges be completely reversed, or in the alternative, that if the Civil Service Commission (Commission) upholds the Official Written Reprimand, she should receive back pay for five days and not be banned from applying to a specialized unit for one year as she claims that there is no authority for that sanction.

In response to the minor discipline appeal, the appointing authority asserts that this appeal is not proper as L.H. has not alleged that the appointing authority was motivated by discrimination when it imposed discipline against her. Further, it presents that pursuant to her negotiated union contract, L.H. requested that this matter be referred to JUMP for disposition. At JUMP, L.H.'s authorized union representative negotiated a settlement and JUMP adopted it. Therefore, the appointing authority argues that the L.H. is attempting to undo her settlement and re-litigate the matter with the Commission. Moreover, it asserts that it is inconsequential that the appointing authority may have been willing to consider a lesser sanction at some other point in the process. Finally, the appointing authority indicates that it has the authority to ban L.H. from applying to a specialized unit as an officer cannot have any charges against them within one year of application. Although given the opportunity, the appointing authority did not respond to the discrimination appeal.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides, in pertinent part, that minor discipline may be appealed to the Commission. The rule further provides:

1. The Civil Service Commission shall review the appeal upon a written record or such other proceeding as the Commission directs and

determine if the appeal presents 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 decision.

2. Where such issues or evidence under (a)1 above are presented, the Commission will render a final administrative decision upon a written record or such other proceeding as the Commission directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level. In considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the administrative management of the Civil Service Commission. The Commission will also not disturb minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010).

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as age, color, and sex/gender, is prohibited and will not be tolerated. Moreover, *N.J.A.C.* 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

In this matter, the appellant has not established that the disciplinary action against her meets the standard detailed above. Specifically, the appellant does not dispute that R.V. ordered her to file a report with him on the March 29 incident, that she did not turn the report into to him that day as ordered, and that he was the appropriate person to receive the report under the appointing authority's chain of command. Instead, she claims that during settlement discussions, the appointing authority offered to drop the charges against her if she dropped the State Policy claim against R.V. and she contends that this is evidence that the charges were in retaliation for her filing a State Policy complaint. However, it is noted that the appellant does not offer any confirming proof that the appointing authority made this offer and only states that this is what her union representative told her. Such assertion, without substantial credible evidence in support of such allegation, is not sufficient to meet the Commission's minor discipline standard in this circumstance. Moreover, the record indicates that the appellant's allegations in her State Policy complaint were not substantiated after an investigation by the DOC's Office of Equal Employment and therefore the Commission finds that the appellant has not

sustained her burden of proof. Even if the appellant had provided further substantiation of such an offer, that, in and of itself, is not evidence of any retaliatory motive by the DOC or evidence that the charges were not otherwise legitimate.

In reference to the appellant's comments that she did not receive notice of the JUMP hearing or the decision or her concerns with the settlement reached, alleged violations or concerns of specific procedures governing disciplinary actions which may be controlled by the labor agreement negotiated between the employer and majority representative cannot be addressed by the Commission.

With respect to her discrimination appeal, the Commission finds that L.H. has not established that she has been subjected to a violation of the State Policy. The investigation consisted of interviewing 14 witnesses, R.V., and reviewing relevant documents. The investigation included interviewing four of the five witnesses that the appellant identified. However, none of these witnesses or other documents substantiated the allegations. On appeal, L.H. argues that L.L. should have been interviewed as he has relevant information and therefore the investigation was incomplete. However, under *N.J.A.C. 4A:7-3.2(i)*, the EED had discretion as to how it conducted its investigation. Further, L.H. has not indicated how L.L., her union representative, could provide evidence that he witnessed discriminatory behavior by R.V. against her. Additionally, L.H. has not presented specific named trainees who were not interviewed who could substantiate that R.V. subjected L.H. to discrimination or harassment. Mere speculation, without evidence, is insufficient to substantiate a State Policy violation. *See In the Matter of H.F.* (CSC, decided April 19, 2017). Accordingly, the Commission finds that the investigation was thorough and impartial and L.H. has not met her burden of proof.

One other matter needs to be addressed. L.H. complains that the EED's time to complete the investigation was excessive as her complaint was filed in early April 2016 and the determination was not made until the end of May 2017. However, she complained about incidents that took place in March 2014, December 2014, January 2015, and May 2015. *N.J.A.C. 4A:7-3.1(d)* and *4A:7.3.2(a)* provide that employees are encouraged to immediately report suspected violations of the State Policy and *N.J.A.C. 4A:7-3.1(e)* mandates that supervisors immediately refer allegations of violations of the State Policy to the EED. Excessive delays in reporting suspected violations of the State Policy can cause delays in the EED's investigation as witnesses and other evidence may no longer be as easily available. Accordingly, as L.H. waited over two years from the date she first suspected that a State Policy violation occurred before filing a complaint with the EED, she is somewhat responsible for the appointing authority's delay. Still, the Commission notes that under *N.J.A.C. 4A:7-3.2(l)3*, the maximum time an appointing authority has to issue a determination is 180 days. Further, although given the opportunity, the EED did not provide an explanation as to why the determination was not issued in

a timely fashion. Therefore, the appointing authority is warned that if it continues to not strictly comply with the time frames as set for *N.J.A.C.* 4A:7-3.2(l), its failure to do so may result in fines or other appropriate actions. *See In the Matter of B.S.* (CSC, decided February 22, 2017).

ORDER

Therefore, it is ordered that these appeals 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 4th DAY OF APRIL, 2018



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