In the Matter of Robert Trent, Department of Corrections
CSC Docket No. 2009-4310
(Civil Service Commission, decided September 21, 2011)

Robert Trent, a Senior Investigator, Parole and Secured Facilities, represented by Catherine Elston, Esq., appeals the decision of the Department of Corrections to reassign him from Mountainview Youth Correctional Facility to the Central Reception and Assignment Facility.[1]

By way of background, the appellant and M.M. (a female Principal Clerk Typist), filed separate complaints with the Equal Employment Division (EED), Department of Corrections, alleging that each had harassed the other in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). As a result of the complaints, the appellant was "temporarily" reassigned to the Central Reception and Assignment Facility, effective March 18, 2009. In a May 4, 2009 letter, the EED indicated that with regard to the complaint filed against the appellant, the investigation did not substantiate a violation of the State Policy and therefore, the matter was closed. However, the EED also noted that "due to the circumstances" of the matter, it was being referred for appropriate administrative action. In a May 28, 2009 letter to the appellant's attorney, the EED indicated that the "imposition of the remedial measures of EED retraining and transfer" were necessary and appropriate under the circumstances. Specifically, it noted that the complaint against the appellant alleged sexual harassment and although several allegations were substantiated, none of the allegations supported a finding that the appellant had acted in violation of the State Policy. However, the EED noted that the appellant's conduct warranted immediate remedial action to ensure that no further conduct would be taken by him against M.M., and to ensure that he was aware of the sexual harassment provisions under the State Policy. Therefore, the EED maintained that the "transfer" of the appellant to a location "geographically close to home" and training about the State Policy was necessary. As a result, the appellant's reassignment was made permanent.

On appeal, the appellant argues that by reassigning him, the appointing authority has imposed unlawful disciplinary action in violation of Civil Service law and rules. In the instant matter, the appellant notes that the EED indicates that he was reassigned solely to prevent some kind of harassing conduct, which it determined had not occurred since it found he had not violated the State Policy.[2] Therefore, he argues that his reassignment cannot be classified as anything but a disciplinary penalty with career altering implications. Specifically, he argues that he is precluded from obtaining any promotional opportunities that he would have

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[1] Mountainview Youth Correctional Facility is located in Annandale, Hunterdon County and the Central Reception and Assignment Facility is located in Trenton, Mercer County.

[2] Since the EED did not find a violation of the State Policy, the appellant did not appeal that determination. However, he asserted that he did not engage in any of the alleged conduct.

been eligible for at his former location (Mountainview Youth Correctional Facility), and he was effectively demoted from being second in charge at Mountainview Youth Correctional Facility to having no supervisory responsibilities. He also asserts that contrary to the EED's assertion, he was not reassigned to a location closer to his home.[3] Rather, his new location is over 40 miles further from his home than Mountainview Youth Correctional Facility was from his home. Additionally, the appellant argues that his due process rights were violated since he had no notice or an opportunity to be heard, prior to discipline being instituted. Consequently, the appellant maintains that his reassignment should be reversed.

In response, the EED argues that the appellant's claim is without merit and should be dismissed. Specifically, it maintains that the investigation corroborated that the appellant had called M.M. on her personal cell phone, gave her chocolates and a handwritten note indicating that "you have a special place in my heart," and wanted to speak with her about "something personal." However, the EED determined that "[w]hile this conduct, by itself, may not establish a claim for sexual harassment under the [State] Policy, it does warrant immediate remedial action to be taken by the [appointing authority] to ensure that further harassing conduct does not occur." Therefore, in order to ensure that no further inappropriate conduct would occur, the appellant was reassigned to another office, he was provided one-on-one EED counseling, and he was provided with a written directive not to engage in any further conduct in this regard. The EED argues that the appellant's reassignment was made in good faith pursuant to *N.J.S.A.* 11A:4-16. Specifically, it asserts that there was a substantial basis for it to take the remedial action of reassigning the appellant to an office within close geographic proximity to his home.

The EED maintains that the appellant's reassignment does not constitute a disciplinary action or an issue appropriate for appeal to the Civil Service Commission (Commission) as it was not an action recognized by the union contract to serve as the basis of an appeal to the Commission. In this regard, it asserts that the union contract for the New Jersey Investigators Association provides under Article X, C. Scope of Grievance (1)(a), that appeals may be made directly to the Commission only for out-of-title work, position classification and reevaluation review, layoff and recall rights, examination procedures for which an appeal exists, release at the end of a working test period, and denial of sick leave injury (SLI) benefits. Therefore, since no disciplinary action was taken against the appellant pursuant to *N.J.A.C.* 4A:2-2.2 and *N.J.A.C.* 4A:2-2.9, the appellant's appeal should be dismissed since it is not a subject matter that he is allowed to appeal pursuant to his union contract. Rather, it argues that his only avenue of recourse is to file a grievance under his contract. Further, the EED contends that the courts have recognized that the movement of an employee from one department to another does

[3] Personnel records indicate that the appellant resides in Phillipsburg, Warren County.

not constitute an inappropriate transfer for disciplinary reasons.[4] The EED claims that since the remedial action undertaken by it was necessary to provide a work environment free from harassment, and it was not arbitrary, capricious or unreasonable, then the appellant's appeal should be dismissed.

In response, the appellant argues that the information supplied by the EED is a blatant misrepresentation of this matter. Initially, the appellant asserts that the EED's partiality in this matter could not be more pronounced since it merely reiterates M.M.'s allegations and fails to provide his responses to the allegations or address his cross-complaint. Moreover, the appellant maintains that although the EED sets forth a series of purported findings as a result of the investigation, those "findings" were never relayed to him, as he was only provided a short letter that stated that no violation of the State Policy was established. Therefore, the EED's position that he did not appeal its findings can only have been made to mislead the Commission as there were no "findings" for the appellant to appeal as he was not found to have violated any rule, regulation or policy. Additionally, the appellant notes that the EED acknowledges that the alleged conduct did not rise to the level to establish a claim for sexual harassment. The appellant argues that if there was no evidence to sustain a violation of any policy, rule or regulation, as evidenced by him not being charged with any disciplinary infraction, and no violation of the State Policy occurred, then no disciplinary action should have been taken. Instead, the appointing authority took an adverse disciplinary action against him by reassigning him to another location. In this regard, the appellant alleges that the EED acknowledges that the reassignment was solely due to an unproven complaint of sexual harassment, and that the appointing authority took such action to prevent any incident that "may" arise in the future. As a matter of law, that is not a valid basis to impose discipline, and is certainly not an action that is "necessary" or "appropriate" as alleged by the EED.

Additionally, the appellant argues that the foregoing clearly establishes that the appointing authority acted in bad faith in reassigning him. In this regard, he notes that M.M.'s allegations were viewed as credible, despite the fact that the investigation failed to yield one witness to corroborate them. Rather, the EED's findings are predicated upon one witness stating that handwriting on a note "appeared to be that of the appellant" and that the appellant made one phone call to M.M.'s cell phone. The appellant maintains that these "findings" are particularly astounding when the investigation also revealed that the corroborating witness was, only a few days before M.M.'s filing of the complaint, reprimanded for

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[4] However, that is not the holding in the case cited by the EED, *Administrative Office of the Courts v. Richford*, 161 *N.J. Super.* 165 (1978). Rather, the matter concerned the question of whether the employee's movement from one State department to another State department constituted a transfer under *N.J.A.C.* 4:1-15.1 (now repealed) since her "transfer" was not to the same "class" (*i.e.*, title). *See also, N.J.A.C.* 4A:4-7.1.

mishandling of evidence, and that the reprimand was the direct result of a complaint filed by the appellant against the witness.

The appellant maintains that although it is a management prerogative to reassign employees, the appointing authority incorrectly contends that its management prerogative allows it to reassign the appellant as discipline without going through the disciplinary procedures. In this regard, the appellant asserts that unless a reassignment is for some legitimate business need, such as staffing reasons, then the reassignment can be considered an adverse personnel action or discipline. Although the EED insists that there was some established misconduct, it failed to go through appropriate disciplinary measures. Moreover, it acknowledged that there was no basis to support a violation of the State Policy. If there was no basis to support a violation of the State Policy, there was no basis to impose discipline, and the appellant's reassignment was improper and in bad faith.

Finally, the appellant disputes that the reassignment was to a location closer to his home. On the contrary, he maintains that his former commute was only 20 minutes. However, his commute to the Central Reception and Assignment Facility is one hour each way.

CONCLUSION

N.J.A.C. 4A:4-7.2 states that a reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organization unit. Reassignments shall be made at the discretion of the head of the organizational unit. Further, *N.J.A.C.* 4A:4-7.7 states that when an employee challenges the good faith of a reassignment, the burden of proof is on the employee. That section also provides that such an action may not be used as part of a disciplinary action, "except when disciplinary procedures have been utilized." *See also, N.J.S.A.* 11A:4-16.

In the instant matter, during the investigation into a violation of the State Policy, the appointing authority reassigned the appellant from Mountainview Youth Correctional Facility to the Central Reception and Assignment Facility, effective March 18, 2009. This reassignment continued upon conclusion of the investigation which found that the appellant had not violated the State Policy. The EED stated that although it did not substantiate a violation of the State Policy, the appellant's conduct warranted immediate remedial action to ensure that no further conduct would be taken by him against M.M., and to ensure that he was aware of the sexual harassment provisions under the State Policy. Therefore, he was reassigned and received additional training. The EED argues that disciplinary action was not taken against the appellant pursuant to *N.J.A.C.* 4A:2-2.2 and *N.J.A.C.* 4A:2-2.9, and therefore, since it acted in good faith, and he is not allowed to directly appeal the matter to the Commission pursuant to his union contract, the matter should be dismissed. However, the EED acknowledges that the reassignment was a

"remedial" action to ensure the appellant did not engage in any further inappropriate conduct. It is clear that the remedial action of reassigning the appellant was in fact discipline for the appellant's alleged conduct. Pursuant to *N.J.A.C.* 4A:4-7.7, the appointing authority may not reassign the appellant as a remedial action, without utilizing disciplinary procedures. A reassignment in violation of this rule may be appealed to the Commission, and the Commission's jurisdiction is not subject to the provisions of a union contract. Moreover, regardless of the union contract, an appointing authority is required to utilize appropriate disciplinary procedures in disciplining its employees. In this regard, one of the main purposes of Civil Service law and rules is to ensure certain protections to career service employees. One such protection is that prior to being disciplined, an employee has an opportunity to review the charges and an opportunity to dispute those charges. The appellant was not provided with that opportunity prior to being reassigned. Therefore, within 20 days of the issuance of this decision, the appointing authority shall issue a Preliminary Notice of Disciplinary Action (PNDA). If the appointing authority does not issue a PNDA within 20 days of the issuance of this decision, then the appellant is to be returned to his prior location, Mountainview Youth Correctional Facility. *See In the Matter of Tameshia Russell* (CSC, decided August 17, 2011).

The Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than $10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A.* 11A:10-3; *N.J.A.C.* 4A:10-2.1(a)2. *See In the Matter of Fiscal Analyst (M1351H), Newark*, Docket No. A-4347-87T3 (App. Div. February 2, 1989). As noted above, the appointing authority has been ordered to issue a PNDA to the appellant within 20 days of the issuance of this decision or return him to his prior location. If, at any time, the appointing authority does not adhere to this timeframe without an approved extension of time, it shall be assessed a fine of $100 per day for each day of continued violation up to a maximum of $10,000.

ORDER

Therefore, the Commission orders that the Department of Corrections initiate disciplinary procedures and issue Robert Trent a PNDA or return him to his position as a Senior Investigator, Parole and Secured Facilities at the Mountainview Youth Correctional Facility within 20 days of the issuance of this decision. If the Department of Corrections does not issue a PNDA or return Trent to the Mountainview Youth Correctional Facility within 20 days of the issuance of this decision, it shall be assessed a fine of $100 per day for each day of continued violation up to a maximum of $10,000.