

B-25



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of B.S., Department of
Human Services

Discrimination Appeal

CSC Docket No. 2016-3757

ISSUED: FEB 23 2017 (HS)

B.S., a former Senior Cottage Training Technician with the Department of Human Services (DHS),¹ appeals the determination of the Assistant Commissioner, which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

S.M., a Practical Nurse, filed a complaint on November 21, 2013 alleging that the appellant had discriminated against him on the basis of national origin. Specifically, S.M., who is African-born, alleged that the appellant, a Caucasian, made derogatory remarks such as, "Africans are crazy." In response to S.M.'s complaint, the Office of Equal Employment Opportunity (EEO) conducted an investigation, substantiated the allegation against the appellant and issued its determination on April 1, 2016. However, since the appellant was separated from State service, no further action was taken.

On appeal to the Civil Service Commission (Commission), the appellant contends that it is unfair for her to have to respond to S.M.'s complaint, filed approximately two years and four months before the EEO issued its determination, when the other involved parties were interviewed but she was never interviewed and no statement was obtained from her. The appellant denies the allegation.

In response, the EEO states that it conducted an investigation during which it reviewed several documents and interviewed S.M. and two witnesses. The

¹ It is noted that the appellant separated from State service effective November 5, 2015.

witnesses corroborated the allegation that the appellant commented, "Africans are crazy." The EEO states that it attempted to contact the appellant, who was on leave at the time of the investigation, using the contact information available at the time from her personnel file. However, it was determined that the telephone contact information was no longer valid. Nevertheless, the EEO maintains that an interview of the appellant would not have changed its determination in that two credible witnesses supported the allegation and the appellant provides no new information that would change its determination. Had she been interviewed, her denial would not have carried the weight of the witnesses' statements, which were not impeached by other witnesses or evidence.

CONCLUSION

Initially, the appellant complains that the appointing authority did not investigate S.M.'s complaint and issue a determination in a timely manner. S.M.'s complaint was filed on November 21, 2013, and a determination was not issued until April 1, 2016. Clearly, the appointing authority did not adhere to the regulatory time frame. In that regard, *N.J.A.C.* 4A:7-3.2(l)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C.* 4A:7-3.2(l)3 states that the time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of EEO/AA and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

Moreover, in numerous past decisions, the appointing authority has been advised to adhere to the time frame. In *In the Matter of L.C.* (MSB, decided September 6, 2006), the Merit System Board² (Board) advised the DHS to strictly comply with the time frames set forth in *N.J.A.C.* 4A:7-3.2(k) (now *N.J.A.C.* 4A:7-3.2(l)2) and that its failure to do so may result in fines or other appropriate actions. In *In the Matter of T.J.* (MSB, decided March 28, 2007), the Board again reminded the DHS to take steps to ensure that investigations are completed in the required time frame. Further, in *In the Matter of R.B.* (MSB, decided October 24, 2007), the Board advised the DHS that any future, egregious violations will result in fines or other appropriate action. See *N.J.A.C.* 4A:10-2.1. Thereafter, in *In the Matter of N.B., et al.* (MSB, decided August 27, 2008), *In the Matter of P.G.* (CSC, decided October 22, 2008), and *In the Matter of J.R.* (CSC, decided December 3, 2008), the determinations of the DHS were issued almost two years and 10 months after the

² On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

discrimination complaints were filed. The DHS provided explanations in *P.G.* and *J.R.*, *supra*, citing to staffing shortages and administrative reasons, which the Board found were unsatisfactory reasons for the two-year delay in P.G.'s case. Subsequently, the timeliness issue was raised again in *In the Matter of A.J.-S.* (CSC, decided January 27, 2010) and *In the Matter of P.G.* (CSC, decided October 6, 2010).³ In *A.J.-S.*, *supra*, the DHS explained that two of its investigators had recently left and it was not authorized to hire additional staff. It noted that it had over 16,000 employees, an inordinate amount of EEO complaints, and had presently only three investigators. In these cases, the Commission accepted reasons for the delay in issuing the determinations, but once again warned the DHS in *P.G.-2* that if it failed to comply with the regulatory time frame in the future and egregious violations occur, it may be subject to fines and penalties pursuant to *N.J.A.C. 4A:10-2.1(a)2*.

As set forth above, the appointing authority was advised as early as 2006, prior to S.M.'s complaint in 2013, and also in 2010 that it must adhere to the regulatory time frame or it would be subject to fines. Further, in 2012, also prior to S.M.'s complaint, the DHS was given a final warning in *In the Matter of S.S.* (CSC, decided September 19, 2012). In that case, the Commission stated:

Therefore, having reviewed this matter thoroughly and finding that the reason for the delay to be unacceptable and the DHS having been warned repeatedly to no avail, the Commission issues **a final warning** that, pursuant to *N.J.A.C. 4A:10-2.1(a)2* future, egregious, violations may result in fines up to \$10,000 (Emphasis added).

Consequently, in *In the Matter of S.J.* (CSC, decided April 9, 2014), the Commission fined the DHS \$1,000 for its violation of *N.J.A.C. 4A:7-3.2(l)*, finding that the excessive seven-year delay in investigating the complaint compromised the thoroughness of the investigation. In the instant matter, the determination of S.M.'s 2013 complaint was not issued until over two years later, even after the appointing authority received a final warning in September 2012 and was fined in April 2014. Accordingly, the Commission finds the appointing authority's actions egregious in light of the State Policy requirements and the Commission's past warnings and fine. The appointing authority's delay is not acceptable, especially given the aforementioned history. Therefore, the DHS is assessed a fine of \$2,500 for its violation of *N.J.A.C. 4A:7-3.2(l)*. See *In the Matter of C.L.* (CSC, decided December 7, 2016).

As stated by the Commission in *S.J.*, *supra*, the time frame set forth in *N.J.A.C. 4A:7-3.2(l)* is not for the administrative convenience of the appointing authority. Rather, this time frame is an important part of the State Policy. By

³ The P.G. referred to in this matter is not the same P.G. referred to previously in this paragraph and will be referred to as P.G.-2.

requiring determinations to be issued at most within 180 days of a complaint, if a violation is found, action can be taken relatively quickly to help prevent future violations. Otherwise, an individual or an agency could be a repeat offender of the State Policy for years before any action is taken. Additionally, investigations can become compromised if not completed timely as witnesses may retire or be otherwise difficult to locate, memories fade, and evidence disappears with the passage of time. Further, it is unfair to the complainant and respondent to have to wait years for a resolution. Thus, the Commission takes the timeliness of an investigation very seriously.

Turning to the merits of this appeal, it is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. See *N.J.A.C. 4A:7-3.1(a)3*. The protected categories include 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. See *N.J.A.C. 4A:7-3.1(a)*. It is a violation of the State Policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background or any other protected category. See *N.J.A.C. 4A:7-3.1(b)*. The State Policy is a zero tolerance policy. See *N.J.A.C. 4A:7-3.1(a)*. Further, the appellant shall have the burden of proof in all discrimination appeals. See *N.J.A.C. 4A:7-3.2(m)4*.

The Commission has conducted a review of the record in this matter and finds that an adequate, though untimely, investigation was conducted and that the investigation established that the appellant violated the State Policy. The available documents were appropriately analyzed and witnesses were interviewed in investigating S.M.'s complaint prior to concluding that the appellant violated the State Policy on the basis of national origin. The appellant's denial notwithstanding, two credible witnesses corroborated the allegation that the appellant stated, "Africans are crazy." Clearly, this is a demeaning comment based on national origin. In addition, the appellant's appeal does not demonstrate how the outcome of the investigation would have been different had she been interviewed or a statement been obtained from her, especially in light of the two credible witnesses who corroborated the allegation. Accordingly, the investigation was thorough and impartial, and there is no basis to disturb the EEO's determination.

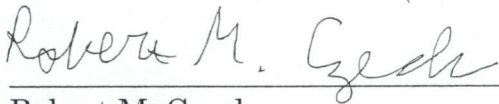
ORDER

Therefore, it is ordered that this appeal be denied. It is further ordered that the fine incurred for noncompliance of *N.J.A.C. 4A:7-3.2(l)* assessed against the

DHS in the amount of \$2,500 pursuant to *N.J.A.C.* 4A:10-2.1 and *N.J.S.A.* 11A:10-3, be remitted within 30 days of the issuance of this decision.

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 22ND DAY OF FEBRUARY, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

- c. B.S.
Edward McCabe
Christina Mongon
Mamta Patel
Beth Wood
Records Center