

he was initially given the choice to either stay in the EEO Monitoring Program or to be “transferred,⁴” however, after he mentioned discrimination during an April 14, 2014 meeting with management, he was advised that he could no longer stay in the EEO Monitoring Program and was forced to “transfer;” and management monitored his emails in retaliation for his comment about discrimination.

Due to a conflict of interest, the Division of EEO/AA conducted an investigation of the appellant’s complaint and the Director of the Office of Employee Relations, Office of the Governor, issued the determination. The investigation included interviewing witnesses and relevant documents. However, the Division of EEO/AA was unable to substantiate that P.M. targeted the EEO Monitoring Program for change of procedure and reorganization based on race. The change consisted of distribution of questionnaires to State contractors/vendors as opposed to onsite investigations, resulting in a reduction to the number of site visits and workload. These new procedures did not require five employees in the EEO Monitoring Program. Since there were two vacant positions in the CCAU due to retirements, the appellant and another employee were reassigned. The Division of EEO/AA determined that the changes and the appellant’s reassignment were due to business and operational reasons and not motivated by any animus in violation of the State Policy. Moreover, the Division of EEO/AA did not substantiate a State Policy violation regarding the appellant’s allegation that P.M. “only had the all black unit answering the phone.” Rather, the investigation revealed that all calls to the EEO/AA certificate hotline were forwarded only to employees in the EEO Monitoring Group or to employees who dealt with such certificates due to their knowledge and ability to answer the questions that could arise from a call from that hotline. No evidence was revealed that race was a motivating factor for P.M.’s decision.

As to the appellant’s allegation of working out-of-title, the Division of EEO/AA found that for a short period of time, the appellant was considered to be an “acting” Procurement Specialist 2 due to his duties. However, his Civil Service title of Affirmation Action Specialist 2 was not changed. Moreover, it noted that the job specification for Affirmation Action Specialist 2 had been amended.⁵ Thus, the Division of EEO/AA determined that the changes in the appellant’s job title or to

⁴ A “permanent transfer is the movement of a permanent employee between organizational units within the same governmental jurisdiction. In State service, an organizational unit shall mean an appointing authority.” *See N.J.A.C. 4A:4-7.1(a)1*. Since the appellant did not move between appointing authorities, his movement is considered a reassignment. *N.J.A.C. 4A:4-7.2* provides that “a reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit. *See N.J.A.C. 4A:4-7.7* for appeals.”

⁵ Agency records reveal that the definition section of the job specifications for Affirmative Action Specialist 2 and 3, examples of work, and the knowledge and abilities sections were revised to clarify and distinguish these levels in the title series. The revised job specifications were issued on October 3, 2015.

the title's job specification were not motivated by his age or race. Furthermore, the investigation did not reveal that training in the Procurement Specialist 2 title had been withheld. No formal training was available; however, handouts were given to the appellant outlining the process. The appellant's new supervisor also offered to accompany him to at least one job, but the appellant did not accept the offer.

The Division of EEO/AA was also unable to substantiate the appellant's claim that he was reassigned in retaliation for a comment he made in a meeting. Specifically, in a meeting regarding the reorganization of the unit, the appellant indicated that members of the EEO Monitoring Program held protected status (because all the employees in the unit were African American) and that he felt as though the unit was being targeted. The investigation revealed that while the appellant was initially given the opportunity to choose to stay in the EEO Monitoring Program, once D.I. discovered that he could not move a supervisor to the two vacant positions, he chose to move the two least senior employees which included the appellant. Thus, no State Policy violation was found in that regard. Moreover, as evidence of retaliation resulting in his comment, the appellant presented emails which noted that "[y]our message . . . was read on . . . (UTC) Monrovia, Reykjavik." The Division of EEO/AA found that "(UTC) Monrovia, Reykjavik" was a default time zone location for Microsoft Outlook and not an employee listed in the State employee directory. Therefore, the investigation of the appellant's complaint could not substantiate that he was discriminated against based on his race or age or that he was retaliated against in violation of the State Policy.

Subsequently, the appellant raised discrimination claims in his Performance Assessment Review (PAR). Specifically, he wrote that he disagreed and objected "to what appears to be a . . . discriminatory . . . 'Forced Transfer' to conduct Contract Administration duties." He also alleged that DPP had chosen to "disrupt a unit comprised of . . . minorities/female workers in the EEO/AA Unit." Finally, the appellant maintained that it appears that the "EEO/AA Unit is being set up to fail." In response, the Division of EEO/AA advised that appellant that it had already investigated his claims based on his earlier discrimination complaint and did not substantiate any violation of the State Policy. The appellant also files an appeal of that determination.

On appeal to the Civil Service Commission (Commission), the appellant disputes the findings with regard to "Targeting the EEO Monitoring Program;" "Working Out of Title;" being "Transferred in Retaliation/TWENTY FIVE (25) YEARS SENIORITY (IGNORED);" and the lack of training. As his remedy, the appellant requests that he be returned to the EEO Monitoring Program performing solely contract compliance work. Initially, the appellant outlines the responsibilities of his unit, its work, and the procedures which had been changed by P.M. He alleges that "without cause . . . or justification" P.M. decided "to launch an illegal campaign" of discrimination, disparate treatment, and creation of a hostile

work environment against one of the units he supervises. The appellant also maintains that his reassignment not only violates EEO/AA law and regulations, but also a 2011 agreement that reassigned and transferred certain units. In being reassigned to the DPP in 2011, the appellant was informed by D.I. in writing that the “reassignment will not impact your current title, status, salary or anniversary date.” Moreover, the appellant explains that in a meeting when he asked D.I. why his unit was being targeted since its members held protected status, D.I. in a “sarcastic voice” said that he could not believe the appellant “went there” and he looked around the room and said “Ok . . . if you feel that you have been discriminated against . . . then file.” The next day, the appellant and two other employees were sent an email from D.I. to contact him with their decision to remain performing the EEO/AA work. The appellant confirmed that he wanted to remain in the unit. Despite his confirmation, the appellant claims that P.M. and D.I. “STILL” retaliated against him by ignoring his seniority and reassigning him. He contends that he was no longer a “permanent” Affirmative Action Specialist 2 in the EEO/AA Contract Compliance Unit. He was also retaliated by having his title and duties changed “without consent.” Additionally, the appellant maintains that he has been “forced” to work out-of-title with no training period provided. The appellant notes that he received a “revised PAR,” which included his Procurement Specialist 2 duties. He reiterates that this action goes against the 2011 agreement and is in violation of the State Policy. He also indicates that, in 2014, he filed grievances that he was “being involuntarily reassigned to a new & provisional position, Procurement Specialist, where he will [lose] his permanent civil service status, be forced to test for a position he may not qualify for and forego his current seniority in position.” He also grieved that he was “prevented from performing his core duties of [his] position . . . by management, who refuses to recognize the job duties of the Affirmative Action Specialist 2.” Additionally, he claims that his revised PAR assigns him clerical duties.

Furthermore, the appellant alleges that he was “threatened to take a test” for a Procurement Specialist 2 position for which he is not qualified. He asserts that “there would be no place for an AA/EEO Investigator. As a direct result, this involuntary ‘FORCED’ Transfer appears to be a very ‘MEAN SPIRITED’ way to get rid of those near or nearing retirement age.” Additionally, the appellant claims that he was retaliated by the Division of EEO/AA. In that regard, he explains that when he questioned the investigator as to the propriety of the investigation by the State since he specifically only filed with the EEOC due to conflict of interest issues and was told by the EEOC not to discuss his complaint with anyone, the investigator read him the following: “all employees are expected to cooperate with investigations undertaken . . . Failure to cooperate in an investigation may result in administrative and/or disciplinary action up to and including termination of employment.” Although at the time he did not feel coerced when the investigator asked him, he felt and still feels “threatened” and “intimidated.” The appellant emphasizes that the State Policy protects him as the complainant and he should not be subjected to adverse employment consequences.

Regarding his claims in his PAR, the appellant objects to the determination of the Director, Division of EEO/AA, since she “did not quote any rules or regulations to support or sustain” her position. As such, he claims that the Division of EEO/AA is in violation of the provisions of his collective bargaining agreement pertaining to seniority, layoff, transfer and reassignment, and out-of-title work. Similarly, because the appellant contends that he is performing “the duties of Contract Administration,” he asserts that the Division of EEO/AA “appears to be in direct violation” of the State Policy, the State Treasurer’s letter regarding his work unit, and the grievances that he filed. The appellant disagrees with the elements of his PAR as it does not reflect the duties of an Affirmative Action Specialist 2. He also reiterates his claims regarding his “forced transfer” and the targeting of his unit. In support of his appeals, the appellant submits letters, emails, regulations, his PARs, operating procedures, guidelines, excerpts from his union contract, his grievances, and a copy of the State Policy.

In response, the Division of EEO/AA initially notes that the appellant has failed to allege that it has caused him any adverse employment action based upon his involvement in this discrimination complaint to sustain a claim of retaliation. Moreover, it relies on its determination and reiterates the findings of its investigation. For instance, it maintains that the evidence did not substantiate that the EEO Monitoring Program was targeted in violation of the State Policy. Following consultation with the Office of the Attorney General, procedural changes occurred that included utilizing self-reporting questionnaires. The changes were due to a desire to increase compliance percentages, which resulted in a reduction in the number of site visits. In turn, the workload decreased and there was no longer a need for all five employees to remain in the EEO Monitoring Program. As such, the subsequent reassignment of the appellant and another employee, who were the least senior employees, were due to business and operational reasons. Additionally, the Division of EEO/AA explains that for a time the appellant was functioning as a Procurement Specialist 2, but his actual title and salary were not affected. It also maintains that the appellant’s duties have now been revised so that his primary responsibilities are consistent with his title of Affirmative Action Specialist 2. Although the foregoing occurred, the Division of EEO/AA states that these changes were not motivated by the appellant’s age or race. Further, it indicates that although the appellant wanted more formal training, the evidence did not substantiate his claim that training was withheld in an effort to “force him to retire.” In addition, the investigation did not reveal that D.I.’s decision to reassign the appellant was due to the appellant’s comment that the members of the EEO Monitoring Program held protected status. Rather, in reviewing the collective bargaining agreement and Civil Service regulations, D.I. determined that moving the EEO Monitoring Program supervisor was not possible and he had to reassign the least senior Affirmative Action Specialists, which included the appellant.

As for the appellant’s allegations on appeal, the Division of EEO/AA contends that the appellant fails to submit any information to substantiate that the

respondents provided inaccurate or incomplete responses. Rather, what the appellant submits was, “in large part, a recitation of what was provided to the Investigator.” Moreover, the Division of EEO/AA contends that the appellant does not present evidence on appeal that D.I. reaffirmed that he would remain in his prior unit. Even if there had been a reaffirmation by D.I., the Division of EEO/AA emphasizes that any such reaffirmation occurred after the April 14, 2014 meeting. Thus, appellant’s allegation of retaliation due to his statement at the meeting is weakened. Further, the Division of EEO/AA contends since the appellant’s Civil Service title was never changed, the appellant’s assertion that he was “threatened” to take a test for Procurement Specialist 2 is without merit. Therefore, the Division of EEO/AA maintains that the appellant has not met his burden of proof in this matter.

CONCLUSION

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. This policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, advancement appointment, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions, and career development. *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)*. Additionally, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. *See N.J.A.C. 4A:7-3.1(h)*. Moreover, 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 thorough review of the record and finds that an adequate investigation of his complaint was conducted, which included interviews and a review of pertinent information, and no State Policy violation was found. In that regard, it is clear that the reorganization of the EEO Monitoring Program was not motivated by race, but rather, due to organizational and business reasons, new procedures were instituted. The appellant fails to present any evidence that the questionnaires were utilized as a pretext to dismantle a whole unit in violation of the State Policy. The questionnaires reduced the number of site

visits as well as workload. Thus, fewer employees were needed in the unit. It is emphasized that reassignments are at the *discretion* of the head of the organizational unit. See *N.J.A.C.* 4A:4-7.2. Moreover, although the appellant may have 25 years of service, he does not claim that the other employees who remained in the EEO Monitoring Program have less seniority than him. He has also not proven that seniority was not the main reason for his individual reassignment. Additionally, while it may have appeared that “the all black unit [were] answering the phone,” the appellant does not dispute the findings that the calls to the EEO/AA certification hotline were forwarded to the employees who had the knowledge and ability to answer the questions. In addition, the record does not indicate that the appellant was retaliated for his comment in a meeting to discuss the movement. In fact, the appellant was given a choice to remain in the EEO Monitoring Program, and as asserted by the appellant, his choice was acknowledged. However, due to legitimate business reasons, namely because of supervision and contractual agreement consideration, the appellant could not remain.

Regarding working out-of-title, there is nothing in the record to demonstrate that the appellant’s situation was motivated by his race or age. Since he was reassigned, his duties apparently changed. It is emphasized that the Commission has found that the appellant’s reassignment was not in violation of the State Policy. The subsequent change of duties appeared to have been due to business necessity, which eventually was corrected. As noted by the Division of EEO/AA in response to the appellant’s appeal, the appellant’s duties are now commensurate with the duties of an Affirmative Action Specialist 2 and his salary and title were never affected. He was also not required to take a test. Nonetheless, should the appellant believe that he is currently performing out-of-title duties, he may pursue a request for classification review pursuant to *N.J.A.C.* 4A:3-3.9. Moreover, if he disagreed with his final PAR rating or performance standards, the appellant could have challenged the same through procedures set forth in *N.J.A.C.* 4A:6-5.3(b) through (d). Nevertheless, the investigation did not reveal that the issues he raised in his PAR were found to be discriminatory in violation of the State Policy. Furthermore, the investigation revealed that no formal training was available, but the appellant was given assistance. Although the appellant does not consider this training sufficient, there is not persuasive evidence to sustain a claim of discrimination based on race or age or that training was withheld to “force him to retire.” In addition, the appellant contends that there were violations of provisions of his union contract and a prior agreement establishing his unit. However, the Commission does not have jurisdiction to enforce or interpret grievance procedures or other items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. See *In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). The proper forum to bring such concerns is the Public Employment Relations Commission. See *N.J.S.A.* 34:13A-5.3 and *N.J.S.A.* 34:13A-5.4(c). Nonetheless, apart from mere allegations, there is nothing in the record to demonstrate that the reorganization of the EEO Monitoring Program or the

appellant's reassignment were motivated by a discriminatory reason in violation of the State Policy. Thus, the appellant's allegations are unsupported.

With respect to the appellant's retaliation claim against the Division of EEO/AA, it is initially noted that *N.J.A.C.* 4A:7-3.1(a) indicates in relevant part that the State of New Jersey is committed to providing every State employee with a work environment free from prohibited discrimination and harassment. Moreover, pursuant to *N.J.A.C.* 4A:7-2.1(a)12, the Division of EEO/AA reviews all discrimination complaints under Title VII of the Civil Rights Act of 1964, the New Jersey Law Against Discrimination, and the State Policy, and evaluates trends and recommends appropriate policy change. Additionally, *N.J.A.C.* 4A:7-3.2(e) provides that if reporting a complaint to any of the persons presents a conflict of interest, the complaint may be filed directly with the Division of EEO/AA. In this case, although the appellant contends that he only filed with the EEOC, given that he filed a complaint against the designated appointing authority for the Department of the Treasury, D.I., and pursuant to the aforementioned regulations that the State Policy proscribes all forms of prohibited discrimination, it was appropriate for an administrative investigation to be conducted by the Division of EEO/AA. Further, the appellant claimed discriminatory conduct in his PARs. Thus, in accordance with Executive Order No. 44, it was proper for the Director of the Office of Employee Relations to have issued a determination and for the Director of the Division of EEO/AA to have issued the second determination. With regard to the latter, the appellant challenges the determination of the Director of the Division of EEO/AA arguing that the Director failed to "quote any rules or regulations to support or sustain" her position. However, *N.J.A.C.* 4A:7-3.2(i) states that at the discretion of the EEO/AA's Officer, an impartial investigation into the alleged harassment or discrimination will take place. Since the discrimination allegations in the appellant's PAR are the same as the claims investigated in his first complaint, a second investigation was not necessary. Therefore, it was appropriate for the Director of the Division of EEO/AA to have relied on the determination of the Director of the Office of Employee Relations that no State Policy violation occurred.

Moreover, as set forth above, no employee under the State Policy shall be subjected to adverse employment consequences. *See N.J.A.C.* 4A:7-3.1(h). Prohibited actions taken against an employee because the employee has engaged in protected activity include imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons. However, in the appellant's case, he was not threatened. In order for the Division of EEO/AA to fulfill its responsibility to ensure a workplace free of discrimination, it was necessary for the appellant's interview and cooperation in the matter, regardless of whether he filed an administrative complaint of discrimination. In that regard, *N.J.A.C.* 4A:7-3.1(d) states in pertinent part that "all employees are expected to cooperate with investigations undertaken . . . Failure to cooperate in an investigation may result in administrative and/or disciplinary action, up to and including termination of employment." Thus, the appellant was being advised of

the regulatory provision and was not subjected to threatening or retaliatory behavior in violation of the State Policy.

Under these circumstances, the appellant has failed to meet his burden of proof. *See N.J.A.C. 4A:7-3.2(m)4.* Accordingly, no basis exists to find a violation of the State Policy.

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 27TH DAY OF MARCH, 2018



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