



STATE OF NEW JERSEY

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

In the Matters of D.M.,
Department of Health

CSC Docket Nos. 2019-412 & 2019-1822

Discrimination Appeal &
Administrative Appeal

ISSUED November 13, 2019 (EG)

D.M., a Program Support Specialist 3, Assistance Programs,¹ with the Department of Health (DOH) appeals the determination of the Chief of Staff, DOH, stating that the appellant failed to present sufficient evidence to support a finding that he had been subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). Additionally, D.M. appeals the determination by DOH to remove him from his provisional position and appoint him to a title that was comparable to his previously held title. These matters have been combined as they concern similar issues.

Discrimination Appeal

The appellant, an Asian Indian male, filed a complaint on August 1, 2018, that Assistant Commissioner, N.H., had subjected him to sexual harassment. Specifically, the appellant alleged that sometime in May 2018, that while he was in a closed-door meeting with N.H., the appellant observed that N.H. was sexually aroused and that he pressed his private area into the appellant when he leaned over the appellant, who working on a computer. Additionally, the appellant claimed that N.H. then followed him over to a printer and again pressed his aroused private area into him. Further, the appellant asserted that when he returned to his desk, N.H. put his hand on the appellant’s thigh and touched his private area. The appellant then stated that when he got up to leave N.H. gave him a one-armed hug and said “don’t take this otherwise.”

¹ At the time the appellant filed his complaint, he was serving as a provisional Coordinator Primary and Preventative Health with DOH.

Based on the aforementioned allegations, the Office of Diversity and Equity Services (ODES) conducted an investigation into the appellant's complaints. It interviewed N.H. who denied all the allegations. N.H. also indicated that the office door was never closed as alleged by the appellant. ODES found that no one else had witnessed the alleged actions. Additionally, it interviewed three witnesses named by the appellant, that the appellant had told about N.H. touching his leg. The witnesses confirmed that the appellant told them that N.H. had touched his leg but indicated that the appellant did not mention any touching of private areas or that N.H. had pressed his private area into the appellant. One witness did state that the appellant had indicated that N.H. had leaned against the appellant. Based on the foregoing, ODES was unable to substantiate the appellant's allegations that N.H. violated the State Policy.

On appeal, the appellant contends that the witnesses did indicate to ODES that he had mentioned N.H.'s sexual touching but that ODES omitted that information in its findings. The appellant argues that N.H. admitted to being in the appellant's office. Additionally, the appellant asserts that N.H. had him demoted when the appellant refused his sexual advances. Finally, the appellant believes that N.H. is being shielded and that the ODES investigation was not unbiased and that N.H. had previously influenced one of the appellant's prior discrimination complaints.

In reply, ODES asserts that on July 20, 2018, the appellant was informed by N.H. that he had not scored in the top three positions for the Coordinator Primary and Preventative Health examination and that he would have to be moved from his provisional position in that title into a comparable title to his permanent title which was not used by DOH. Thereafter, on August 1, 2018, the appellant filed his sexual harassment complaint. Additionally, it reiterates that when N.H. was interviewed he denied all the allegations. Further it reiterates that none of the witnesses indicated that the appellant had told them that N.H. pressed his private parts against him or touched the appellant's private parts. With regard to N.H.'s influence over another discrimination matter that was investigated by the ODES, the EEO/AA for the Civil Service Commission reviewed the matter. The EEO/AA informed the appellant in an August 7, 2018 letter that there was no evidence that N.H. was interviewed, contacted or spoken to regarding the prior discrimination complaint. The letter also stated that since the complaint was about supervision and management of the unit, had N.H. been contacted during the investigation it would not have been inappropriate or a breach of confidentiality by the ODES to do so.

Administrative Appeal

By way of background, the appellant was appointed to the title of Guardianship Services Specialist 2 (class code 22) effective December 26, 2015,

while in the Department of Human Services (DHS). On September 17, 2016, the appellant and his unit were transferred from the DHS to the DOH and he was provisionally appointed to the title of Coordinator Primary and Preventive Health Services (class code 29) in the Division of Family Health Services (unit scope H400). On July 21, 2018, the appellant's appointment was discontinued and he was placed provisionally pending a qualifying examination, in the title of Program Support Specialist 3, Assistance Programs (class code 22).² Specifically, the appellant was told that as his prior title of Guardianship Services Specialist 2 was not used by DOH, he was being placed in a title comparable to his permanent title.

On appeal, the appellant argues that the appointing authority's basis to remove him from his provisional position was based on a false assumption. Specifically, the appellant was told by the appointing authority that he was being demoted because he did not rank in the top three on the eligible list for Coordinator Primary and Preventive Health Services. The appellant asserts that upon contacting the Division of Agency Services, he learned the eligible list being relied upon by the appointing authority was for a different division, Family Health Services (unit scope H400), than his current division, Community Health Division (unit scope H390). In support of his contentions the appellant submits the letter informing him of his demotion and the promotional announcement for Coordinator Primary and Preventive Health Services indicating that it was open to a different division than his current division. The appellant also claimed that his demotion was based on discrimination and retaliation by an Assistant Commissioner. The appellant notes that he filed a discrimination complaint regarding these issues. Additionally, the appellant asserts that he was demoted for filing a Whistle Blower complaint against the Assistant Commissioner for misuse of federal funds. Further, the appellant claims that he did not agree to be placed in a comparable title rather than his prior held title. Moreover, the appellant claims that his Performance Assessment Reviews (PARs) have not been completed in an attempt to show that he has not done any work.

CONCLUSION

Discrimination Appeal

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

² Subsequently, on January 19, 2019, the appellant was moved to unit scope 390. Agency records indicate that the appellant received a regular appointment to Program Support Specialist 3, Assistance Programs, effective September 1, 2018.

information, liability for service in the Armed Forces of the United States, or disability. *N.J.A.C.* 4A:7-3.1(c) provides that it is a violation of this policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment.

In addition, retaliation against any employee who alleges that he or she 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 the subject of other retaliation. *See N.J.A.C.* 4A:7-3.1(h). Examples of such retaliatory actions include, but are not limited to, termination of an employee; failing to promote an employee; altering an employee's work assignment for reasons other than legitimate business reasons; imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees).

In the instant matter, the Civil Service Commission (Commission) has conducted a review of the record and finds that an adequate investigation was conducted. Specifically, the relevant parties were interviewed and the appropriate records were reviewed. Specifically, the ODES interviewed the witness identified by the appellant. In this regard, while the witnesses recalled the appellant mentioning that N.H. had touched him on the thigh, none of the witnesses indicated that the appellant told them about N.H.'s alleged sexual acts aimed at the appellant. Additionally, N.H. denied all of the appellant's allegations. Further, the ODES found that no one had witnessed the actions the appellant alleged had occurred. On appeal, the appellant contends that the witnesses did indicate that they were told about the sexual actions, but that ODES omitted that information. However, other than his unsupported claims, the appellant has not provided a scintilla of evidence that the ODES' investigation was improper. Moreover, the alleged biased prior investigation of discrimination was investigated by this agency's EEO/AA and found to have been clear of N. H.'s influence. Furthermore, a review of the record reveals that the appellant was not demoted for refusing N.H.'s sexual advances, rather he was returned to a comparable permanent position after failing to score in the top three in the examination for the provisional title he held. Since he could not be permanently appointed in his provisional title, he had to be placed in a comparable to his permanent title, as explained below.

The determinations made by the ODES are well reasoned, fully explained, and based on a thorough investigation. Moreover, the appellant has not provided any dispositive evidence in support of his contentions that he was subjected to a violation of the State Policy. Therefore, the appellant has not sustained his burden of proof in this matter. Accordingly, based on the foregoing, no basis exists to find a

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

Administrative Appeal

N.J.S.A. 11A:2-6 and *N.J.A.C.* 4A:2-2.1(a) provide that the major discipline rules apply only to permanent employees in the career service or a person serving a working test period. Further, *N.J.A.C.* 4A:2-1.4(c) provides that in appeals other than disciplinary matters, the burden of proof is on the appellant.

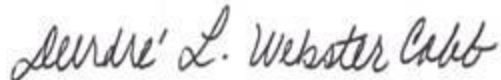
In the present matter, the appellant argues that he was improperly demoted to a comparable title because the appointing authority relied on inaccurate information about the eligible list and for discriminatory and retaliatory reasons. In this regard, the Commission notes that employees holding provisional titles do not have a vested right to a permanent appointment, and as such, do not have the right to appeal their separation or removal from such positions to the Commission. *See O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987). Therefore, based on his provisional status, the appellant does not have standing to appeal the return to his prior held title. Furthermore, given that the appellant's permanent title of Guardianship Services Specialist 2 was not utilized by DOH, it was proper for the appointing authority to place him in a comparable title in the same class code as his permanent title. *See N.J.A.C.* 4A:4-1.9(c) and (f).

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 6TH DAY OF NOVEMBER, 2019



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