



STATE OF NEW JERSEY

In the Matter of M.S.,
Department of Transportation

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

CSC Docket No. 2018-3749

Discrimination Appeal

ISSUED: NOVEMBER 21, 2019 (JET)

M.S., a Management Improvement Specialist 1 with the Department of Transportation, appeals the determination of the Executive Director, Division of Civil Rights and Affirmative Action, which found that the appellant failed to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

M.S. filed a complaint with the Division of Civil Rights and Affirmative Action (DOCR), alleging that he was subjected to discrimination based on his age in violation of the State Policy. Specifically, the appellant alleged that he was not promoted as a Program Supervisor, Internal Audit as a result of his age. In this regard, he claimed that he should have been selected as he possesses over 20 years of applicable experience while serving in his unit, and he had substituted for managers when they were absent from work. The appellant added that he informed his coworkers that he planned to retire at age 60. The appellant complained that his supervisor, J.T., a Program Supervisor, Internal Audits,¹ subjected him to differential treatment based on his age. Specifically, the appellant alleged that J.T. inappropriately set deadlines for completion of projects and added new criteria to his employee evaluations, which included learning the New Jersey Comprehensive Financial System (NJCFS) accounting program. The appellant also alleged that the Bridge Analysis Management System (BAMS) computer program was removed from his work computer and subsequently installed on J.T.'s computer.

¹ J.T. was provisionally appointed as a Program Supervisor, Internal Audits, effective June 11, 2016, and he was permanently appointed to that title effective January 26, 2017. Prior to his promotion, J.T.'s prior position was Administrative Analyst 4.

Additionally, the appellant asserted that, at the time of his interview for Program Supervisor, Internal Audit, J.J., the former Inspector General, was a member of the panel that interviewed him.² In this regard, the appellant alleged that J.J. was the only panelist who took notes in pencil and asked questions during the interview. The appellant stated that another panelist was serving in a title that was in a lower salaried title range with respect to the Program Supervisor, Internal Audit title, and as such, should not have been authorized to participate on the panel and interview him. The appellant claimed that, after the panel had concluded his interview, it requested J.T. to follow up with additional questions that the panel did not ask at the time of the interview. As such, the appellant claimed that the panel acted inappropriately with respect to his non-selection for Program Supervisor, Internal Audit. Moreover, the appellant alleged that a DOCR representative was not present at the time of his interview.

After an investigation was conducted, the appellant's claims were not substantiated. Specifically, the June 11, 2018 DOCR determination indicated that J.T. was interviewed by a three-person panel for the aforementioned position, and although he was not selected for a promotion, he was not singled out or treated unfairly during the interview process based on his age. Moreover, the appellant's supervisor, J.T., was interviewed and he denied that he singled the appellant out or discriminated against him based on his age with respect to his work assignments.

On appeal, the appellant explains that there is no evidence to show that he failed to complete an assignment, and he maintains that he has never refused an assignment. Rather, the appellant explains that the assignment in question was delayed as the BAMS program was removed from his computer and, as a result, he was required to use a calculator to complete the assignment. He adds that he has been employed in State service for 35 years, has accumulated a sufficient amount of sick and vacation leave entitlements, and his requests for time off were approved. As such, the appellant argues that J.T.'s concern that he used in excess of 15 days of sick leave is irrelevant.³ The appellant contends that, although J.T. does not know how to use the BAMS program, he improperly removed the program from his computer at the time the appellant took a vacation. The appellant adds that, although he requested J.T. to provide him with a password for the BAMS program, J.T. did not follow up with the request. The appellant contends that the refusal to provide a password constitutes bullying in the workplace. The appellant argues that it appears that DOCR is protecting J.T. in this matter, as the June 11, 2018

² J.J.'s appointment as Inspector General was discontinued effective July 21, 2017.

³ The appellant notes that he has accumulated 130 days of sick leave entitlements, and he carries 25 vacation days of leave time over each year. He adds that he has two teenage daughters and his mother is 84 years old.

DOCR determination contains several false statements.⁴ Moreover, the appellant asserts that he does not understand why DOCR did not interview him at the time of the investigation, and the written reprimand that was issued against him was unwarranted.⁵

In response, the DOCR maintains that there was no violation of the State Policy. Specifically, the DOCR asserts that J.J. was not interviewed as she left State service. Further, DOCR contends that the appellant was frequently disruptive in the workplace, and in response, an official reprimand was issued against him on October 12, 2017. Further, the DOCR explains that J.T. placed a deadline on one of the appellant's assignments pursuant to J.J.'s instructions, as there was a large amount of technical analysis that was required for that assignment.⁶ DOCR adds that there was no nexus to show that the deadline was related to the appellant's age in violation of the State Policy. Rather, the deadline was set for legitimate business reasons. Further, DOCR explains that J.T. was interviewed and he confirmed that the appellant did not timely submit a report and was absent from work for a lengthy amount of time.⁷ As such, J.T. found it necessary to remove the BAMS computer system from the appellant's computer in order to complete assignments. As such, DOCR determined that the removal of the BAMS system from the appellant's computer was based on the legitimate operational needs of the agency.⁸ In addition, DOCR states that J.T. indicated that he expects auditors to review work expenditures using the NJCFS system, which is the reason he added such criteria to the appellant's employee evaluations.⁹ As such, DOCR found that adding such criteria to the employee evaluation did not constitute a violation of the State Policy. Regarding the appellant's interview for Program Supervisor, Internal Audit, DOCR contends that the panel forwarded the candidate interview questions to DOCR for review and it subsequently approved them for the interview. It adds that the interview questions consisted of specific auditing

⁴ The appellant does not provide any information on appeal with respect to the alleged false statements.

⁵ DOCR's August 20, 2018 response to this appeal indicates that the appellant was interviewed by a DOCR representative on or about February 9, 2018.

⁶ DOCR notes that one witness stated it was unusual to have deadlines set for an assignment, and another witness confirmed that deadlines were common. DOCR indicates that less complex audits have up to two months of expected deadlines, while complex audits have expected deadlines of up to a year. DOCR states that, generally, a typical audit is completed within six months.

⁷ DOCR notes that the appellant used in excess of 15 sick days within a 12 month period in 2016 and 2017, and he used 25 vacation days in 2017.

⁸ DOCR notes that J.T. instructed the appellant to avoid sending e-mails to other employees with respect to the BAMS program, and the appellant responded by e-mail, "Are you saying that I should not notify personnel or DOCR if I feel I'm being discriminated against?" DOCR states that the appellant also alleged that the IT unit hacked into his computer, which was not confirmed at the time of the investigation.

⁹ DOCR states that a witness confirmed that J.T. uses the NJCFS system to produce spreadsheets, and another witness indicated that the program is used to review audit transactions. DOCR adds that J.T. confirmed that he considers knowledge of the NJCFS systems is imperative as it is the primary accounting system used in his unit.

questions regarding familiarity with generally accepted government auditing standards, and several questions were presented with respect to supervisory experience. DOCR explains that, although it was unable to schedule a representative to be present at the time of the interviews, the investigation determined that J.T. was appropriately selected for the above noted position based on the justification that was provided by the panel. DOCR adds that, although a member of the panel, T.M., an Administrative Assistant 1, was serving in a lower level position with respect to the Program Supervisor, Internal Audit position, the investigation did not reveal any discriminatory motivation by the panel toward the appellant.¹⁰ Moreover, as noted above, DOCR interviewed the appellant on or about February 9, 2018.

Additionally, DOCR asserts that the appellant raises new issues on appeal with respect to an employee who was provided with an extended amount of time to complete an assignment, and he alleges that J.T. stated, "You are nearing retirement anyway" near the time the BAMS system was removed from the appellant's computer. DOCR contends that, since these issues were not raised at the time of the interview, it will not address the new issues raised on appeal. However, it explains that the appellant may submit a new complaint to DOCR with respect to such concerns.

CONCLUSION

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 information, liability for service in the Armed Forces of the United States, or disability. It also provides, in pertinent part, that employment discrimination or harassment based upon a protected category, such as age discrimination, is prohibited and will not be tolerated. The appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C.* 4A:7-3.2(m)(3).

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that the appellant has not established a nexus between his allegations and age in violation of the State Policy. The record reflects that the DOCR conducted a proper investigation. It interviewed the relevant parties in this matter, including the appellant, and appropriately analyzed the

¹⁰ DOCR notes that a panel should typically consist of three members serving in an equal or higher level position with respect to the position that is the subject of the interview. DOCR confirms that the members of the panel included J.J., A.T., a former Program Supervisor, Internal Audit, and T.M., an Administrative Assistant 1.

available documents in investigating the appellant's complaint. The underlying determination was correct when it determined that there was no violation of the State Policy. The appellant's arguments on appeal and the allegations of his complaint do not evidence that he was discriminated against based on any of the above listed protected categories listed in the State Policy.

Regarding the appellant's allegations pertaining to his supervisor, he has not provided one scintilla of evidence to show that he was discriminated against or harassed based on age. With respect to the appellant's argument that his supervisor placed deadlines on his assignments, the deadlines, in and of themselves, are not sufficient to substantiate a violation of the State Policy. The record reflects that the appellant's supervisor was instructed by management to do so as the assignment was complex and required a large amount of technical analysis. As such, the appellant's supervisor used deadlines as a result of the business needs of his unit, and not as a basis to discriminate against him based on age. Regarding the appellant's allegations that the BAMS program was improperly removed from his computer, there is not a scintilla of evidence to show that the removal of the program was the result of invidious motivation by the appellant's supervisor. Rather, the record reflects that J.T. removed the program based on the legitimate operational needs of his unit. Although the appellant argues that he has never refused an assignment, and an assignment was delayed as he was required to use a calculator after the BAMS program was removed, such information does not establish his contentions. The investigation revealed that it was necessary for the appellant's supervisor to remove the program to complete various assignments as the appellant was taking time off from work. The appellant's arguments that he is entitled to take sick and vacation leave time and the program was removed at the time he took a vacation does not, in and of itself, show that the appellant was discriminated against or harassed based on age. Rather, it was at the supervisor's discretion to remove the program in order to complete assignments. While the appellant argues that his supervisor added additional information to his employee evaluations, such information does not establish his claims. The record reflects that J.T. considered knowledge of the NJCFS system as a priority, and as such, he added it as criteria to the appellant's employee evaluation. As such, the matter was properly addressed by J.T. within the appellant's employee evaluation. In this regard, employee evaluations are based on a supervisor's own judgment. Moreover, there is no information to show that the appellant received low employee evaluations, or that J.T.'s ratings were based on the appellant's age. As such, there is no nexus to show that the appellant's employee evaluations subjected him to a violation of the State Policy. Moreover, the record reflects that the written reprimand issued against the appellant was as a result of disruptive behavior and was not based on his age.

Other than the appellant's tenuous claims, there is no information to show that J.T.'s actions as alleged by the appellant were anything other than his exerting

supervisory authority at the time of the incident. Even if the appellant disagreed with J.T.'s style of management, the Commission has consistently found that disagreements between co-workers cannot sustain a violation of the State Policy. *See In the Matter of Aundrea Mason* (MSB, decided June 8, 2005) and *In the Matter of Bobbie Hodges* (MSB, decided February 26, 2003). Additionally, management or supervisory style is not reviewable under the State Policy unless that style evidences some form of discriminatory conduct under the Policy. Moreover, there is no information to show that other employees were singled out or harassed based on their age.

With respect to the appellant's allegations that the interview panel for the Program Supervisor, Internal Audit position acted inappropriately, he has not provided any substantive evidence of that claim on appeal. Although DOCR confirmed that a panel member was serving as an Administrative Assistant 1, such information does not substantiate a violation of the State Policy or establish the appellant's claims on appeal. DOCR confirmed that the panel interviewed the appellant on April 20, 2016, and it provided a legitimate basis for not selecting the appellant based on its oral interviews. DOCR confirmed that the panel asked each candidate identical questions regarding government auditing standards and supervisory experience, which the appellant does not dispute. In this regard, it is within an appointing authority's discretion to choose its selection method. Appointing authorities are permitted to develop and utilize objective standards in order to determine how to use that discretion. The use of a panel of interviewers familiar with the position and the assignment of numerical scores in a number of categories related to the position is a permissible way for the appointing authority to make a hiring decision, so long as that hiring decision is in compliance with *N.J.A.C. 4A:4-4.8(a)3*. *See In the Matter of Paul Mikolas* (MSB, decided August 11, 2004) (Structured interview utilized by appointing authority that resulted in the bypass of a higher ranked eligible was not in violation of the Rule of Three). In this matter, the panel conducted oral interviews with the candidates, and each candidate was asked identical questions as noted above and were provided with the opportunity to respond. The record indicates that the appointing authority then selected the candidate it determined was best suited for the position. While the appellant may disagree with this methodology, he has not established that it was improperly implemented or that his non-selection via this process was for an improper or impermissible reason. Moreover, the appellant has not provided any information in support of his allegations that J.T. asked follow-up interview questions at the panel's request. Even presuming the validity of the appellant's statement that J.T. asked follow-up questions, he has not established that such questions were in violation of the State Policy or that they caused an adverse outcome with respect to the selection process. Contrary to the appellant's allegations, the record reflects that DOCR approved the interview questions for use by the panel, and two of the panel members were serving at the same or in higher

level positions as the position at issue.¹¹ Therefore, since it had already reviewed the questions, it was not necessary for a DOCR representative to be present at the time of the interview, and in any event, Civil Service rules and law do not require such representatives to be present at interviews. As such, the appellant's allegations in that respect are of no moment.

With respect to the appellant's arguments that the DOCR did not interview him, as noted above, he was interviewed on or about February 9, 2018. Nonetheless, it is at the DOCR's discretion to interview as few or as many witnesses as it determines necessary in order to complete an investigation. Additionally, the DOCR interviewed several witnesses, including J.T., and a violation of the State Policy was not substantiated. Other than the appellant's allegations in this matter, he has failed to provide any evidence that he was discriminated in violation of the State Policy. Accordingly, he has not satisfied his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal 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 19th DAY OF NOVEMBER, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

¹¹ The Commission notes that there is no requirement in Civil Service law and rules requiring interview panel members to be at a higher level than the position at issue. In fact, in many cases, panelists are likely serving at lower levels, especially if the position at issue is managerial and some of the panel members are not necessarily from the unit where the vacancy exists. For example, in some cases, Human Resource representatives may serve as panelists and may have "lower" titles than the vacant position. Regardless, in this case, there is no evidence that the composition of the panelists was discriminatory against the appellant in any way.

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