STATE OF NEW JERSEY

In the Matter of T.M., Department of Education	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Administrative Appeal
CSC Docket No. 2019-1956	:	

ISSUED: AUGUST 2, 2019 (HS)

T.M., an Education Program Development Specialist 3, appeals the decision of the Department of Education to reassign her from East Orange to Trenton. She also petitions for relief from the appointing authority's alleged reprisal.

On appeal to the Civil Service Commission (Commission), the appellant explains that she filed a contractual grievance regarding her reassignment alleging that Article 37 of the Communications Workers of America collective negotiations agreement (CNA) had been violated and requesting that her reassignment be rescinded. The Hearing Officer denied the grievance at Step Two. The appellant complains that although the CNA provides that reassignments are to be made "in the inverse order of the job classification seniority of the employees affected," the manner in which the Hearing Officer defined the term "work unit" in the CNA adversely impacted her seniority and substantive rights. In addition, the appellant states that the appointing authority is aware that she is the caregiver for family members with disabilities who are protected by the Americans with Disabilities Act (ADA) and covered under an agreement for leave under the Family and Medical Leave Act (FMLA). Nevertheless, according to the appellant, the appointing authority has ignored the agreement and her needs and has not responded to her "Special Request" for a reassignment due to hardship pursuant to Article 37 of the CNA. The appellant requests that she be returned to her previous location, East Orange, and/or provide her with relocation assistance as her commuting time has increased. In support, the appellant submits copies of her contractual grievance and Step Two decision; Article 37 of the CNA; her approved application for FMLA leave; e-mail correspondence; and other documents.

In response, the appointing authority explains that in August 2018, Assistant Commissioner Linda Eno indicated that the work location for employees who work within the Division of Academics and Performance was Trenton. It states that this division has historically always reported to Trenton. When it was discovered that some employees assigned to the division were not reporting to Trenton but rather to field locations, the Assistant Commissioner took the necessary steps for business continuity and operational effectiveness to reassign these employees to Trenton. As such, consistent with other staff assigned to the Division of Academics and Performance, the appellant's location was reassigned to Trenton, effective November 12, 2018. The appointing authority maintains that all employees assigned to the Division of Academics and Performance now report to Trenton. The Division of Student Services and the Division of Field Services are the only two divisions that have work locations outside of the Trenton area. The appointing authority contends that the appellant's appeal process is through the CNA and it concluded with the Hearing Officer's Step Two decision. For support, it cites *N.J.A.C.* 4A:2-3.3(a), which provides that "[w]here departmental grievance procedures are established by a negotiated agreement, such agreement shall be the applicable appeal process." It also states that it is aware that the appellant submitted a request for reassignment due to hardship on November 14, 2018. At that time, the appellant was instructed to provide an updated resume. The following day, staff informed the appellant that there were no positions available in the northern region. A Notice of Vacancy in Sparta for an Education Program Development Specialist 2 position, a demotion for the appellant, was posted on November 28, 2018. The appointing authority indicates that the appellant did not apply for this opportunity. It also states that as of March 14, 2019, the appellant had not sent an updated resume. Additionally, it asserts that the appellant has been encouraged to apply for interested positions that become available in a work location that is closer to her home. Further, the appointing authority contends that the FMLA entitles employees to paid or unpaid leave to care for their family members but does not entitle employees to select convenient work locations to reduce commuting time. Finally, the appointing authority does not support the appellant's request for relocation assistance since the Division of Academics and Performance has historically always reported to Trenton. In support, it submits copies of organizational charts, personnel records and other documents.

In reply, the appellant asserts that the appointing authority has provided reassignments to accommodate other employees with needs like her own, with race being the only distinguishing factor. Specifically, she is African-American and the other employees are Caucasian. The appellant also indicates her belief that she has been subjected to reprisal for filing this appeal. The appellant points to her mandated attendance at Program Officer training; questioning and commentary regarding her use of FMLA leave; and her assignment in May 2019 to a three-day monitoring visit in Bridgeton, which is a three-hour drive away from her home. In support, the appellant submits e-mail correspondence. In an e-mail dated April 5,

2019, the appellant's Director states that "[a]ll program officers that have been doing Perkins training for less than two years are being asked to attend this training." In an e-mail dated March 5, 2019, the Director advised the appellant that she should call in and leave a message that she will be out if her leave has not been approved in advance and suggested that the appellant e-mail the Director to advise of plans to use FMLA leave. In an e-mail dated March 29, 2019, the Director asked the appellant to submit her timesheet after finding that the appellant was not at her cubicle, advised her to add future out-of-office meetings to an office calendar and requested information about the event the appellant was attending that day. In an e-mail dated April 18, 2019, the Director reminded the appellant to call in and leave a message if she will not be at work and her leave has not been approved in advance.

CONCLUSION

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. *N.J.A.C.* 4A:4-7.7 provides that a reassignment shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. When an employee challenges the good faith of a reassignment, the burden of proof shall be on the employee.

As an initial matter, the Commission will not review the Hearing Officer's interpretation of the CNA, whether the appellant's reassignment violated the CNA or whether the appointing authority is violating the "Special Request" provision in Article 37 of the CNA. The Commission generally does not enforce or interpret items that are contained in a CNA 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).

Nevertheless, the appellant retained the right to appeal her reassignment to the Commission, which may properly consider whether a reassignment is appropriate under *Civil Service* law and regulations. In that regard, reassignments are at the discretion of the appointing authority, but they may not be used for disciplinary purposes except when disciplinary procedures have been utilized and must be made in good faith. *See N.J.A.C.* 4A:4-7.2 and *N.J.A.C.* 4A:4-7.7. On the record in this matter, there is no substantive evidence that the appellant's reassignment was for disciplinary purposes or was not made in good faith. Rather, the reassignment was apparently part of an effort to centralize the employees of an

entire division in a particular geographic area for business reasons.[1] As such, the Commission has no basis to order the rescission of the appellant's reassignment. The Commission also has no basis to grant relocation assistance as the appointing authority does not support this remedy. *See N.J.A.C.* 4A:4-7.3(a)2 ("Relocation assistance will be requested, paid and verified *by the receiving appointing authority*.") (emphasis added).

Turning to the appellant's claim of reprisal, *N.J.A.C.* 4A:2-5.1 generally provides that an appointing authority shall not take or threaten to take any reprisal action against employees in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority or on the employee's permissible political activities or affiliations. *See also, N.J.S.A.* 11A:2-24. In *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. December 1, 2004), it was determined that an employee asserting a cause of action under *N.J.S.A.* 11A:2-24 is required to prove the following elements:

1) The employee "reasonably believed" in the integrity of the disclosure at the time it was made, meaning the employee had no reasonable basis to question the substantive truth or accuracy of the content of the disclosure just prior to communication (it is here that the term "reasonable belief" is borrowed from the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1, *et seq*., to define what is the substantive content of a "lawful disclosure");

2) The employee disclosed the information to a source "reasonably" deemed an appropriate recipient of such information just prior to communication (here, the term "reasonably" is used to describe the perceived proper channels through which a "lawful disclosure" should be communicated);

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[1] The Commission acknowledges the appellant's suggestions that her reassignment was contrary to the ADA and that the appointing authority has made reassignments in a racially discriminatory manner. The Commission may review ADA issues collaterally, when they are implicated in an appeal properly before the Commission, such as a discrimination appeal. *See, e.g., Matter of Allen*, 262 *N.J. Super*. 438, 444 (App. Div. 1993). The Commission also does not investigate claims of disability or race discrimination in the first instance. As such, the appellant is advised that she may file a complaint with one or more of the following regarding her ADA and race discrimination claims: the Equal Employment Opportunity/Affirmative Action (EEO/AA) Officer for the appointing authority; the Division on Civil Rights, New Jersey Department of Law and Public Safety; and the U.S. Equal Employment Opportunity Commission. *See N.J.A.C.* 4A:7-3.2. The appointing authority's determinations of discrimination complaints are appealable to the Commission. *See N.J.A.C.* 4A:7-3.2(m). The enforcing agency for FMLA leave, it may be added, is the Wage and Hour Division, U.S. Department of Labor. *See N.J.A.C.* 4A:6-1.21B(g)4.

3) There is a connection, or nexus, between the disclosure and the complained of action (this is a standard cause-and-effect showing by the employee). *Carlino v. Gloucester City High School*, 57 *F. Supp. 2d* 1, 35 (D.N.J. 1999); *Kolb v. Burns*, 320 *N.J. Super*. 467, 476 (App. Div. 1999).

Only after the employee satisfies the criteria above does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See Wright Line*, 251 *NLRB* 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 *U.S.* 274 (1977).

Using the test as enumerated above, the appellant has failed to present a *prima facie* case of reprisal. Assuming the appellant has met the first and second prongs of the test, she has failed to satisfy the third prong. In this regard, the appellant has not presented any documentation that the complained of actions were due to any prior disclosures on her part. Accordingly, the appellant has failed to present a *prima facie* case of reprisal. Moreover, mandated training for *all* employees performing a certain task for less than a set period of time, being reminded of attendance procedures on three dates and assignment to a single three-day monitoring visit hardly suggest retaliation. The appellant's dissatisfaction with these actions is not sufficient evidence of reprisal.

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 31ST DAY OF JULY, 2019

Deirdré L. Webster Cobb

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