



STATE OF NEW JERSEY

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

In the Matter of F.M., Juvenile
Justice Commission

CSC Docket No. 2020-571

Discrimination Appeal

ISSUED: JANUARY 17, 2020 (SLK)

F.M., a former Deputy Executive Director with the Juvenile Justice Commission¹, represented by Loryn M. Lawson Esq., appeals the decision of Counsel to the Attorney General, which found sufficient evidence to support a finding that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, S.E., a female Secretarial Assistant 3, Non-Stenographic, filed a complaint alleging that F.M., a male, made inappropriate comments and committed inappropriate conduct of a sexual nature toward her. Additionally, she alleged that when she rebuffed F.M.’s advances, he retaliated against her. Specifically, S.E. alleged that F.M.: 1. made comments about how her clothing fit her body; 2. made comments about how the “bump” (*i.e.* buttocks) made the dress she was wearing more fitting, and how the pumps (*i.e.* shoes) she was wearing pushed up the “bump;” 3. stated to her “Can I ask you a question? That’s a 10...What you have between your legs. I can tell by the way you walk. It’s a 10”; 4. made inappropriate comments of a sexual nature toward her, some of which she recorded with her cell phone; 5. made advances toward her by asking if he would have a chance with her if he was not married and not the Deputy Executive Director; 6. leered at her in a manner that made her and others uncomfortable; 7.

¹ Personnel records indicate that F.M. was separated from his unclassified appointment on May 3, 2019.

sent her a text message attaching an album with inappropriate and sexually explicit lyrics; 8. touched her on her bottom while she was standing at the copier; and 9. retaliated against her by making threats of violence, taking work away from her, ostracizing her, and spreading rumors about her when she rebuffed his advances. S.E. also alleged that F.M. used the word “b*****” to describe former Deputy Executive Director G.H. and former Executive Assistant Attorney General D.E.

The Office of Equal Employment Opportunity (EEO) questioned more than 34 witnesses during the investigation and reviewed documents and recordings that S.E., witnesses and F.M. provided. The investigation revealed that several witnesses corroborated that F.M. made inappropriate comments of a sexual nature to S.E. regarding how she dressed and he leered at her. Witnesses also corroborated that F.M. leered at other women and made inappropriate comments about how other women dressed. Additionally, multiple witnesses corroborated the allegation that F.M. used the word “b*****” to describe G.H. and D.E. Further, the recordings that S.E. provided contained inappropriate comments of a sexual nature that F.M. made to her. Moreover, one of the recordings contained a comment where F.M. made a derogatory reference to someone’s sexual orientation. Also, based on the similarity of allegations, the EEO substantiated allegations against F.M. made by other women which were presented during the investigation which involved allegations of leering at them, comments about their dress, and comments about women’s bodies. Further, while the EEO is investigating allegations by other women that F.M. touched them inappropriately and made sexual advances towards them, it was unable to substantiate that F.M. touched S.E.’s bottom, made comments about her “bump,” or made the “it’s a 10” comment. Additionally, the investigation could not substantiate the allegation that F.M. sent S.E. a text message with the album containing inappropriate song lyrics and no witnesses corroborated the allegation that F.M. retaliated against S.E.

On appeal, F.M. highlights his stellar performance reviews and career advancement, including being appointed Deputy Executive Director of Operations in 2008. Additionally, he indicates that there were no prior allegations against him for inappropriate conduct throughout his career. F.M. presents that in 2018, he put his job at risk when he confronted then Executive Director K.B.² regarding his claim that K.B. had an unusually close relationship with S.E. F.M. alleges that K.B. bent rules for S.E.’s benefit, which led to a December 11, 2018 meeting with F.M., two other Deputy Executive Directors and K.B. F.M. indicates that the meeting got loud and F.M. was advised that S.E. overheard portions of the meeting. Thereafter, on December 13, 2018, K.B. informed F.M. that a “serious” EEO investigation had commenced against him and he would need to work in a different location until the investigation ended. F.M. states that while the office remained off limits to him

² Personnel records indicate that K.B. retired on October 31, 2019.

throughout the investigation through his separation, S.E. was not subject to any restrictions.

He indicates that he was interviewed six weeks after being banned from the office and he was not provided any details concerning the investigation prior to his interview. F.M. presents that he was interviewed for a full day on March 1, 2019. During the interview, F.M. advised that rumors were spreading, and his reputation was in freefall due to the allegations. He also stated that he met K.B. outside the office to ask him to reassign S.E. because K.B.'s and S.E.'s relationship had a negative impact on the office. During the interview, F.M. was informed that there was a voice recording of him making inappropriate remarks, he questioned the authenticity of the recording and was advised that he would have the opportunity to listen to the recording before the investigation ended. After the investigation, the EEO advised F.M.'s counsel that it had interviewed additional employees and would need to interview F.M. for a second day. On April 30, 2019, S.E. served F.M. and the State with a lawsuit. Three days later, F.M. was separated from employment prior to the investigation being completed and before he was afforded the opportunity for a second interview. F.M. believes the appointing authority sided with S.E. without the benefit of a completed investigation. He believes it chose to side with the complaining female employee to avoid further negative publicity regarding its responsiveness to claims of harassment by female employees. F.M. presents that the completion of the investigation came two months early and the Office of the Attorney General has repeatedly maintained that his separation was solely due to his "at will" status. He reiterates that the purpose of the second interview was to not only interview him, but to also allow him to review the audio recording which the EEO acknowledged was "poor quality." Consequently, F.M. argues that the July 26, 2019 determination was a rush to judgment based on an incomplete investigation which denied him his due process rights as he was not interviewed a second time and did not get a chance to review the referenced audio recording. Additionally, he was never given the opportunity to respond to the additional witnesses who were relied upon to substantiate S.E.'s allegations and who made additional allegations. He suspects that many of the witnesses had close ties to S.E. F.M. also notes that under the State Policy, the final determination was to be made, at the latest, within 180 days. In this matter, F.M. was removed from the office on December 14, 2018 and, therefore, the July 26, 2019 determination date was outside the maximum allowable time frame. Further, he was not advised of any extension requests during the investigation and of his appeal rights after the final determination.

In response, the EEO states that F.M.'s career performance is not the issue as he could still have "stellar performance reviews year after year" and violate the State Policy. Concerning procedural violations, it acknowledges that he was not provided the extension and appeal right notices due to clerical errors. However, the EEO presents that F.M. filed his appeal in a timely manner. It notes that F.M.

incorrectly believes that S.E.'s complaint against him was in response to the December 13, 2018 meeting. However, S.E.'s complaint was filed in August 2018. After a series of interviews and reviewing documents, it found sufficient facts to open a formal investigation, which was done on December 3, 2018. Concerning F.M.'s allegation that K.B. and S.E. had a romantic relationship, the EEO did not investigate this accusation because S.E. did not allege that she had been coerced or it was an improper relationship and K.B. is retired. It indicates that although F.M. was removed from his office during the investigation, he continued to work until his May 3, 2019 "at-will" separation. The EEO explains that the decision to not allow F.M. to return to the office during the investigation was consistent with the Model Procedures under the State Policy to protect both parties and the integrity of the investigation. It states that although F.M. complains that it took six weeks before he was interviewed, this time was necessary to plan the investigation, develop questions and witness lists and gather evidence. In fact, in an effort to expedite the matter, nine members of its staff, between January 7, 2019 and March 1, 2019, interviewed 23 witnesses. In reference to F.M.'s complaint that he was not given the opportunity to have a second interview and listen to the audio tape, the EEO did reach out to F.M.'s counsel to set-up the second meeting. However, F.M.'s counsel initially e-mailed on May 1, 2019 that he would get back to the EEO; however, his counsel never did prior to the July 26, 2019 final determination letter. It argues that its six-month investigation was thorough and based on the 34 individuals who were interviewed.

The EEO notes that F.M. was not S.E.'s direct supervisor, but she did cover for his administrative support person when on leave. S.E. alleged that F.M. began making inappropriate comments of a sexual nature toward her in 2011, such as "how good it [clothing] looked and the shape of it." Additionally, in 2013, F.M. said to S.E., in front of his Executive Assistant that there were "always rumors being said about me [F.M.] and someone, including [F.M.'s Executive Assistant], and it won't be long before there's rumors about me and you [S.E.]" S.E. alleged that in 2015, F.M. made inappropriate comments such as the "bump," *i.e.* her buttocks, made her dress "more fitting" and how her pumps [shoes] push the bump [buttocks] up. Allegedly he said, "Oh, I just can't shake it. It's driving me crazy." S.E. alleged that in 2015, F.M. saw S.E. at a restaurant with a co-worker and she said it felt like F.M. was undressing her with his eyes. She claimed that the co-worker advised her to carry mace to protect herself. The EEO notes that S.E.'s co-worker confirmed the incident almost exactly as S.E. described. S.E. alleged that in 2015, F.M. made hand gestures when she put her hair behind her ears, when she let her hair down, which she took as F.M. stating that S.E. was driving her crazy based on her appearance. She alleged that on September 23, 2015, F.M. commented to S.E. that, "What you have between your legs. I can tell by the way you walk. It's a 10" and later that day he was shaking and rubbing his head, closing his eyes and stated, "Oh, I can't take it" and "couldn't shake it" in reference to her appearance. Further, on that same day, he sent her song lyrics to her phone which were sexual in nature,

which she interpreted as F.M. telling her that he was interested in her in a sexual manner.

S.E. stated F.M. tried to get her reassigned, which she took as retaliation for rebuffing his advances. Further, in the fall of 2015, she began recording F.M. on her cell phone, and he can be heard saying to S.E. on one recording, "it's hard" approximately nine times as well as "it's a compliment to you." S.E. believed that F.M.'s statement referred to his penis. The EEO notes that when the statement was read to F.M. during his interview, he also interpreted the phrase as referring to his penis. Additionally, F.M. was heard on another recording referring to a singer as "kinda gay." S.E. alleged that F.M. asked her in 2016 if he would have a chance with her if he was not married. She alleged that on March 14, 2016, F.M. touched her bottom. Then, on March 15, 2016, F.M. advised her that he no longer needed her assistance and she responded the next day with an e-mail stating "...I can take a guess as to why this change came about..." because she believed that F.M. knew he did something wrong and wanted to put a barrier between the two. S.E. alleged that a former co-worker said that F.M. told this former employee that K.B. was "getting sloppy and having his girl [S.E.] meet in a public place." S.E. believed that F.M. made the statement to get others to believe that S.E. and K.B. were in a romantic relationship. S.E. alleged that F.M. said that if he found himself in a "Me Too" situation, where allegations of wrongdoing were actually true, he would "kill everyone" and then made motions like he was shooting guns. Additionally, S.E. alleged that she felt threatened when F.M. talked about an "uncle" to handle things so he would not have to get his "hands dirty." S.E. also alleged that F.M. repeatedly asked a female employee out on dates after she told him no and called both G.H. and D.E. a "B****."

During his interview, F.M. denied the allegations. He indicated that during a December 11, 2018 meeting, he asked that S.E. be reassigned due to his allegation that K.B.'s and S.E.'s relationship was causing problems in the office and he believes that S.E. overheard this and then filed the State Policy complaint. However, the EEO advised F.M. that S.E. filed the complaint in Fall 2018. F.M. acknowledged that he gave a female co-worker his cell phone number so they could get to know each other in case there was a position that came up for which she might want to apply. One day he said to that employee, "...let's do lunch," and he claims that this co-worker misread his intentions. He explained that before offering that employee a position in leadership, he wanted to make sure that she had the mettle to deal with officers at a facility, in case they started rumors about her given incidents in her employment history and personal life. F.M. indicated that it was appropriate to date subordinate employees "...as long as you follow the policy." He denied flirting with people at work. Concerning the text message of the album with sexual lyrics, F.M. responded that S.E. most likely used a program to spoof the text message. As the EEO did not have independent corroboration that the text message was legitimate, it did not use the text message to substantiate allegations.

F.M. contends that co-workers said that they saw F.M. leering at S.E. because they wanted to curry favor with her. F.M. believes that S.E.'s e-mail to him in response to his stating that he no longer needed her was referencing an issue that she had with another Executive Assistant and F.M. did not want any part of that situation. When asked why he sent the e-mail to S.E. the day after she alleged that he touched her bottom, he said that anyone could go to any e-mail and say the day before that they had done something to them. F.M. denied making any comments about the "Me Too" movement and denied he ever stated that he would be violent or arrange for violence if he was ever accused of sexual harassment. He denied trying to get S.E. reassigned in 2015. He denied ever using the word "b****."

The EEO reiterated that the investigation consisted of interviewing 34 people, including some more than once. Seven women came forward stating that F.M. leered at them or others, touched them inappropriately, propositioned them, or made noise or comments about how they dressed or looked. Some of the women indicated that when they refused F.M.'s advances, they alleged that he retaliated against them by reassigning them, making the renewal of their contracts difficult, or making it difficult to receive promotions. Several women alleged that others who accepted F.M.'s advances received promotions. The EEO notes that of the seven women who made allegations, four filed separate State Policy complaints against F.M. However, as the pattern of these allegations of these other woman so closely matched S.E.'s allegations, these allegations were part of the analysis of this matter. Numerous witnesses revealed that F.M. leered at S.E. and others. Additionally, S.E. provided recorded conversations that corroborated her allegation that F.M. made inappropriate comments that were of a sexual nature to her as well as making inappropriate comments regarding sexual orientation. Other witnesses also confirmed that F.M. made inappropriate gender-based comments regarding G.H. and D.E. The investigation substantiated that F.M. said to S.E. and other women, "you sure are wearing that dress," he leered at S.E. and other women, he called G.H. and D.E. "b****," made crude, graphic comments to S.E. (it's hard, that's a compliment to you) and made inappropriate sexual orientation comments (that singer looked "kinda gay)." Further, as a Deputy Executive Director, which is the second-highest level of authority at the Juvenile Justice Commission, he breached his duty and was separated from his "at-will" employment on May 3, 2019. Concerning F.M.'s procedural violation allegations, he was interviewed for five hours on March 1, 2019, and he was given every opportunity to come back and listen to the audio recordings as well as respond to the additional allegations against him. However, he chose not to do so despite being contacted several times. Further, once he was no longer an employee as of May 3, 2019, he could not be compelled to participate in the investigation. Therefore, the EEO argues that F.M.'s assertion that he was denied an opportunity to defend himself defies credulity. Moreover, it defies credulity that seven women conspired against him to side with K.B. and S.E. and ruin his career. The EEO notes that K.B. did not participate in the determination of this matter or in the decision to separate F.M. from employment.

It presents that regardless of whether K.B. and S.E. had a relationship, which it did not investigate, that situation does not undermine the independent evaluation conducted by the EEO. Additionally, nine witnesses confirmed that F.M. engaged in inappropriate conduct of a sexual nature toward S.E. or others.

In reply, F.M. states that the EEO indicates that his performance record is “irrelevant.” However, he argues that when a lower-level employee, who is maintaining an intimate relationship with the head of an agency, suddenly asserts a harassment claim against an agency Deputy who calls out this inappropriate relationship, that Deputy’s record matters and his performance is relevant. F.M. believes that there were serious questions about the investigation. He presents that in March 2016, he objected to special procedures put in place by K.B. for S.E. Further, in early 2017, F.M. told K.B. that S.E. needed to be reassigned. He also expressed these specific concerns to two Deputy Attorney Generals investigating S.E. in the summer of 2018. Thereafter, in December 2018, he and other Deputy Directors implored K.B. to take action. However, the EEO notes that this issue was not investigated by it. He argues that a verifiable series of events that explain why S.E. would make-up these allegations were presented to the EEO; however, the EEO chose to ignore this. F.M. wonders if S.E. was facing possible discipline and she may have looked at a way to change the focus from her. F.M. states that the EEO does not deny that the investigation was not completed within the time frame under the State Policy. Instead, it argues “no harm, no foul.” Per the EEO’s submission, the initial intake of the complaint was in August 2018, with meetings held in September and October 2018, and the formal investigation was opened in December 2018. Therefore, it took 11 months from the initial complaint and over seven months from the opening of the formal investigation, which both are time frames that are not in compliance with the State Policy.

Concerning the facts, F.M. presents he raised concerns about K.B.’s relationship with S.E. directly with K.B. in February 2017. Thereafter, in early summer of 2018, F.M. met with the Attorney General’s Office regarding an alleged threat by S.E. against K.B.’s Executive Assistant. At this meeting, F.M. expressed concerns about favoritism that S.E. was receiving due to her relationship with K.B. Then, these concerns reached their boiling point at the December 2018 meeting. Therefore, S.E. was clearly aware of the concerns that F.M. expressed about her relationship with K.B. prior to her filing her complaint against F.M. Consequently, F.M. believes that S.E.’s complaint was retaliatory. Otherwise, he questions why she waited two and one-half years to file a complaint when her allegations against F.M. relate to alleged inappropriate conduct starting in March 2016. Further, F.M. indicates that after being banned from the office, it took three months (March 1, 2019) before he was interviewed. At the interview, he reiterated his position that S.E. concocted her story to prevent adverse action being taken against her due to her relationship with K.B. At that meeting, F.M. was interrogated about statements made from unidentified witnesses, a recording that was described as

“poor quality” and text messages whose authenticity he questions. F.M. notes that the cell phone records could not be obtained as the carrier only retained records for 18 months. It was only on April 9, 2019 that the EEO indicated that additional testimony was needed as “additional witnesses came forward;” however, F.M. does not believe that employees began reaching out to investigators to provide testimony. Instead, F.M. believes that his testimony undermined the EEO’s trajectory of the investigation in the “Me Too” moment of our times. He believes that the outcome of the investigation was never in doubt due to concerns the State has about public perception regarding its handling of sexual harassment claims. F.M. questions the objectiveness of the investigation as the EEO refused to acknowledge that the allegations were implausible based on his reputation that he built over his career, it refused to investigate K.B.’s and S.E.’s relationship, and after a lack of supporting facts, the EEO demanded more time with F.M. a month after his interview. Further, as the second meeting was being scheduled, F.M. was separated from employment on May 3, 2019. F.M. questions why the EEO asked for the second interview to take place on May 6th or May 13th, but then he was separated on May 3rd. He indicates that the answer is that S.E. filed a lawsuit, which has trumped any semblance of due process. F.M. notes that even though the EEO submitted lyrics from the song that he allegedly sent S.E., the EEO already acknowledged that it could not substantiate the allegation that F.M. sent these lyrics. Similarly, the EEO presents allegations regarding certain sexual comments and allegations of physical touching by F.M., which the EEO also could not substantiate. He asserts that the EEO’s “cherry-picking” approach to the investigation should not be ignored. He notes that the EEO did not give him the opportunity to listen to the “poor quality” audio tape that it referenced; yet it still used this audio tape as a basis for its determination. Additionally, he was never given the opportunity to have a second meeting and respond to the new allegations; yet it still relied on these new allegations in its determination.

CONCLUSION

N.J.A.C. 4A:7-3.1(c) states, in pertinent part, that it is a violation of the State Policy to engage in sexual (gender-based) harassment of any kind. *N.J.A.C.* 4A:7-3.2(i) provides that at the EEO’s discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place. *N.J.A.C.* 4A:7-3.2(l) provides, in pertinent part, that the final determination shall be completed within 120 days of the initial intake and may be extended up to 60 days by the agency head in cases involving exceptional circumstances. All parties are to receive notice of the request for an extension. *N.J.A.C.* 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that F.M. violated the State Policy. Specifically, the

investigation revealed that seven women, other than S.E., confirmed that F.M. leered at them or others, touched them inappropriately, propositioned them, or made noises or comments about how they looked or dressed. Additionally, some of these women claimed that F.M. retaliated against them when they refused his advances, such as reassigning them, making the renewal of their contracts difficult or making it difficult for them to receive promotions. Additionally, several women alleged that others received promotions who accepted F.M.'s advances. Further, four of the seven women have filed State Policy complaints against F.M. Additionally, other witnesses confirmed that F.M. called G.H. and D.E. "b****." In other words, while F.M. claims that S.E. fabricated the allegations, that his "stellar" performance reviews and career advancement make the allegations not credible, the EEO's determination was pre-determined, that the determination was based on an e-mail and recording where he questioned their authenticity and quality, and subjective observations of "leering," the investigation revealed overwhelming evidence confirmed by numerous witnesses, who were neither K.B. or S.E., that F.M. engaged in a pattern sexual harassment and retaliation. Moreover, even if K.B. and S.E. were involved in a relationship and regardless of the motivation as to why S.E. filed the complaint, these circumstances would not change this fact. Additionally, while F.M. argues that his due process rights were violated because he did not get a chance to discover if the confirming witnesses had a close relationship with S.E., it is implausible that all these witnesses decided to falsely accuse F.M. of the alleged behavior and damage his career and reputation because of their relationship with S.E. Similarly, F.M.'s procedural complaints regarding timeframes and notices are unpersuasive as these procedural deficiencies do not negate the numerous confirming witnesses.³ Moreover, his complaint that he was not allowed to listen to the "poor quality" audio where he made inappropriate comments is not persuasive, because even if this evidence is disregarded, there was sufficient confirmation from the witnesses that he violated the State Policy. Thus, the Commission finds that the investigation was thorough and impartial and F.M. has failed to meet his burden of proof.

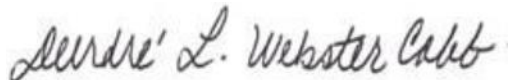
³ The Commission finds that: 1. the delay in issuing the final determination in this matter was not prejudicial to F.M.; 2. there is no basis to grant the appeal based on the delay; and 3. the delay was understandable based on the scope of the investigation. *See In the Matter of Karen Kritz* (MSB, decided January 25, 2006). *See also In the Matter of Demetria Mason-Rogers* (CSC, decided March 24, 2010). Still, the Commission warns the appointing authority that it should try to complete its investigations and issue final determinations within the 180-day time frame as prescribed in the State Policy as, under certain circumstances, the Commission could find that a delay compromises the thoroughness of an investigation and lead to fines for non-compliance. *See In the Matter of S.J.* (CSC, decided April 9, 2014). Also, the Commission directs the appointing authority to ensure that it provides information regarding appeal rights in its determination letters. While that omission did not prevent F.M. from filing a timely appeal in this matter, such information should be provided to allow an employee the opportunity to properly evaluate their options.

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 15th DAY OF JANUARY, 2020



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