



STATE OF NEW JERSEY

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

In the Matter of C.C., Department of
Human Services

CSC Docket No. 2021-143

Discrimination Appeal

ISSUED: OCTOBER 23, 2020 (SLK)

C.C., a male Field Service Supervisor 1, Family Development with the Department of Human Services, represented by Adam Liebttag, President of the Communications Workers of America Local 1036, appeals the jurisdiction of the Office of Equal Employment Opportunity (EEO) to have conducted an investigation, which led to the Chief of Staff issuing a determination that it was unable to substantiate allegations that he was subjected to gender discrimination and retaliation in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, C.C. reported allegations of sexual harassment against R.N., a female Field Service Supervisor 1, Family Development, on February 1, 2019. At that time, C.C. was provisionally serving as a Program Specialist 4 (PS4) and R.N. reported to him. During the investigation, R.N.'s work location was separated from C.C. and she was reassigned to a new supervisor. Thereafter, on February 7, 2019, R.N. made several allegations against C.C. claiming that he made inappropriate remarks to her and certain inappropriate remarks about coworkers. The investigator conducted 18 interviews and reviewed five relevant documents. The investigation revealed that allegations against both C.C. and R.N. were substantiated by witnesses and other evidence. This led to R.N. agreeing to a 20-day suspension. Upon completion of her suspension, R.N. returned to the unit, but continued to report to her new supervisor. Further, C.C. was presented with a settlement offer of a 10-day suspension; however, he did not agree to the settlement and a departmental hearing took place on January 23, 2020. The final notice of his discipline is still pending.

On March 17, 2020, C.C. filed a complaint with the New Jersey Division on Civil Rights (Civil Rights) and the federal Equal Employment Opportunity Commission (EEOC). In this complaint, C.C. presented that he had been provisionally serving as a PS4 and was reachable for appointment on a certification for the subject title. He indicated that he was advised by A.M. a male Assistant Director¹, that the interview was a formality. Thereafter, in October or November 2019, C.C. interviewed with A.M. and T.T., a female Chief of Staff². Subsequently, C.C. was advised he was being “demoted” back to his permanent title and another candidate was appointed. C.C. claimed that he was advised that the reason he was not permanently appointed to PS4 was he did not articulate a “vision” for the unit and he wanted to change the culture of the unit. C.C. asserted that after he filed a grievance in response to R.N.’s allegations, and during the grievance process, he claimed that he discovered evidence that the appointing authority went on a “fishing expedition” to find evidence to discipline and “demote” him. He asserted that the appointing authority retaliated against him by subjecting him to unfounded discipline and a “demotion” and he presents the proximity in time between his discipline and “demotion” and his substantiated sexual harassment complaint as evidence of the retaliation. Further, C.C. contends that the appointing authority retaliated against him when it reintroduced R.N. to his unit after her suspension when it could have placed her elsewhere and he was given the choice post “demotion” of either working in a cubicle near her, working in a location separate from the team, or being reassigned to another unit. He presents that he chose to be reassigned to another unit where he did not have any prior experience.

On March 26, 2020, the EEO was notified by Civil Rights and/or the EEOC that C.C. filed the above complaint. On May 26, 2020, the EEOC informed C.C. that his matter was transferred to Civil Rights. On July 6, 2020, the EEO informed C.C. that it had been notified about his complaint with Civil Rights and the EEOC and it had opened an investigation based on this complaint.

On July 22, 2020, the EEO issued a determination letter based on C.C.’s complaint to Civil Rights and the EEOC. The EEO was unable to substantiate C.C.’s allegation that he was denied a promotion in his provisional PS4 title because of his gender or in retaliation for a prior State Policy complaint against R.N. The investigation revealed that A.S. and T.T. denied the allegations, that they conducted the selection process in accordance with Civil Service regulations and C.C. was not permanently appointed as a PS4 because he did not interview as well as the other candidates and higher ranked candidates on the Civil Service examination were

¹ Personnel records indicate A.M.’s title is Legal Specialist.

² Personnel records indicate that T.T.’s title is Legal Specialist.

appointed.³ Further, it determined that R.N.'s "reintroduction" to the unit after her suspension was not retaliation for his prior EEO complaint as C.C. voluntarily accepted a reassignment to another unit and R.N. received a lengthy suspension.

On appeal, C.C. asserts that the EEO's investigation failed to fall within the Civil Service Commission's (Commission), Civil Rights', and the EEOC's reasonable standards. He presents that he intentionally did not file with the EEO because he claimed retaliation due to a prior complaint with the EEO. Instead, he chose to file with the EEOC with the understanding that the matter would be transferred to Civil Rights. C.C. emphasizes that he did not seek to have this matter referred to the EEO. C.C. states that an EEO investigator called him in June 2020. He indicates that he asked the investigator to submit a request for interview in an e-mail and to include his union representative. However, the EEO did not follow-up on this request.

C.C. presents that there is no correspondence or documentation as to how the EEO was informed about his complaint with Civil Rights and the EEOC. Further, C.C. complains that the determination letter does not offer any substantive explanation as to why he was removed from his provisional appointment as a PS4 and the corresponding loss in compensation. C.C. indicates that as of July 29, 2020, the hearing officer has not issued a decision in his departmental hearing for his disciplinary matter. He claims that this delay is highly irregular and believes that the appointing authority is holding back on its decision until after his retaliation complaint is rejected.

C.C. asserts that his discrimination complaints have been handled with irregular timing. He presents that his initial sexual harassment complaint was filed in January 2019 and the investigation took months, which included him being interviewed on multiple occasions regarding his complaints and to respond to counter allegations. The discipline was issued eight months later in September 2019 and he was "demoted" in November 2019. He claims that he was "demoted" solely on the basis of the unproven counter-accusations, which he did not have an opportunity for a hearing at that time. C.C. questions how his initial complaint and counter allegations can take months to investigation, but his retaliation complaint against the appointing authority can be closed out in two weeks without interviewing him and without providing a satisfactory answer as to why he was removed from his provisional appointment as a PS4.

Regarding his retaliation claim, C.C. presents he provisionally served as a PS4 from 2018 through the end of 2019. He indicates that he received positive

³ There were two PS4 permanent appointments. The first ranked candidate was appointed, the second ranked candidate declined, and the third ranked candidate was appointed. C.C. was the fourth ranked candidate and his non-appointment complied with the Rule of Three. *See N.J.A.C. 4A:4-4.8.*

performance reviews, there were no disciplinary actions, and no negative feedback from his superiors. C.C. highlights that the determination letter acknowledges that he was reachable for permanent appointment on the certification under the Rule of Three. While C.C. acknowledges that the appointing authority could select any candidates on the list who was reachable under the Rule of Three, he asserts that there is a well-established preference and deference to provisionals. He claims that Civil Service procedures favor appointment of provisionals. C.C. reiterates his claim that the accusations in the disciplinary action, which he refuted and believes were solely raised against him in response to the sexual harassment complaint that he filed, were the only reason and illegitimate basis for removing him from the provisional title.

C.C. requests that the determination letter be rejected by the Commission as he claims that the appointing authority had no jurisdiction to issue findings. He was never interviewed or provided the opportunity to submit any comments, supporting documents or any other input into the investigation. C.C. argues that the context in which the EEO initiated its own investigation and exonerated the appointing authority on retaliation claims should be rejected. He claims that the determination is insufficient as the letter does not state why he was removed from his provisional status. Instead, the letter only states that although he was reachable under the Rule of Three, someone else was selected. He asserts that there was no basis provided for that other person's selection such as their experience, interview or any other metric. C.C. claims that his allegation that he was removed because he was charged with discipline and he filed a prior discrimination complaint was essentially unrefuted other than his managers denying the retaliation allegation. He states that his complaint with Civil Rights should continue in that forum. C.C. believes that the EEO should be sanctioned for mishandling the situation. He argues that he should be reinstated to the title of PS4 with back pay retroactive to November 2019. In the alternative, he requests that this matter be transmitted to the Office of Administrative Law (OAL) for a full hearing where the record can be supplemented with additional documents and testimony.

In response, the EEO summarizes the background as stated above. Additionally, it presents that on February 7, 2019, R.N. alleged that C.C. made the following remark about the "Me Too" movement to the effect of, "isn't it funny that the hashtag me too is 'pound me too?'" It was also alleged that C.C. referred to R.N. as "retarded" and referred to another coworker as a "feisty Puerto Rican." It presents that witnesses and other evidence corroborated allegations against R.N., C.C. and two other employees. The EEO states that the disciplinary hearing took place on January 23, 2020, and the final determination is still pending.

The EEO presents that it is standard practice to conduct an internal administrative investigation into all EEO complaints that fall within its jurisdiction, whether received via internal or external complaints. Regarding the current

complaint, the investigator conducted three interviews and reviewed 19 relevant documents. The investigation revealed that there were two PS4 positions available so at least four names needed to be certified. A.S. and T.T. interviewed the second, third and the fourth ranked candidate (C.C.). The appointing authority appointed the first ranked candidate and the second ranked candidate declined the position. The investigation revealed that A.S. and T.T. indicated that C.C. was not chosen “because he interviewed poorly and did not elaborate on many answers even after being prompted.” Further, the third ranked candidate “had experience with systems that matched our need in the unit with an upcoming conversion to an online system.” Further, they stated that C.C. was not selected because “he did not interview well,” “his answers to questions were not thorough, instead they were short and un-descriptive,” and he “did not fully articulate his skills or current job responsibilities, nor did he give examples that supported his assertions.” They noted that his interview only lasted about 20 minutes and that they made the final decision regarding the PS4 appointment.

Regarding C.C.’s allegation that he was required to move to another unit, A.S. replied that C.C. “voluntarily requested a transfer and was given multiple options to stay in the unit since that was our preference.” E-mail messages were presented that indicated that C.C. stated he was not comfortable with R.N. rejoining the workspace. They replied offering to have his desk relocated or that he request a reassignment out of the unit. C.C. replied that R.N.’s presence in the office overwhelmed him with anxiety and he thought that he was being victimized again. He indicated that he found it “troubling that the Division’s solution to this dilemma is to offer that the victim of an offensive, unwanted touching in the workplace be removed from the office rather than the aggressor” and then requested a reassignment out of the unit. Thereafter, T.T. responded to C.C. offering him three options to consider: 1. a seat change apart from R.N. in the same unit, 2. transfer him to another unit, and 3. the Division would consider any accommodation that he may have. C.C. responded that he felt that given R.N. was being re-introduced to his unit, he had no other option but to transfer. Subsequently, he was reassigned to another unit as he requested. T.T. also indicated that although they considered moving R.N. out of the unit, they noted that they initially sought her termination, but it was later downgraded to a suspension. Since they had already served her discipline, they were concerned that moving her would be perceived as further discipline and would support an argument for retaliation.

The investigator stated that he asked C.C. if he had anything to add and C.C. stated that he did not and that all questions should be referred to his union representative. As C.C.’s allegations were contained in his complaint to Civil Rights and the EEOC and he said he had nothing to add, the investigator moved forward with the investigation based on the complaint to Civil Rights and the EEOC.

The EEO presents that it did not take over Civil Rights' jurisdiction as that matter is still pending. Concerning the delay in the appointing authority issuing its discipline, while it does not have specific information, it is its understanding that many disciplinary matters have been delayed due to the Covid-19 pandemic. Regarding C.C.'s statements about "irregular timing," it presents that his initial sexual harassment complaint was reported on February 1, 2019. The investigation consisted of 18 interviews and a determination was issued on July 19, 2019, which was within 180 days as required under Civil Service regulations. Therefore, there was nothing "irregular" about this. Concerning the subject complaint, the EEO received notice of the complaint from the EEOC on March 26, 2020. Therefore, its July 22, 2020 determination, which was within 120 days, was also timely. Concerning the statement that there is a well-established preference and deference to the appointment of provisionals, under Civil Service, a provisional has no right or expectation of appointment. It asserts that C.C. has not presented any evidence that he was discriminated against by A.S. and T.T.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that the State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, employment discrimination or harassment based upon gender is prohibited.

N.J.A.C. 4A:7-3.1(h) states, in pertinent part, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment is prohibited by this policy. No employee bringing a complaint shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. Failing to promote an employee or select an employee for an advancement for filing a discrimination/harassment complaint is an example of a prohibited action.

N.J.A.C. 4A:7-3.2(d), provides, in pertinent part, that supervisors shall immediately report all alleged allegations of the State Policy to the EEO.

N.J.A.C. 4A:7.3-2(i) provides, in pertinent part, that at the EEO/AA Officer'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 a determination shall be issued within 180 days after the initial intake of the complaint.

N.J.A.C. 4A:7.3-2(m) states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

N.J.A.C. 4A:7.3-2(p) provides, in pertinent part, that any employee or applicant for employment can file a complaint directly with external agencies that investigate discrimination/harassment charges **in addition** to utilizing this internal procedure.

In this case, the EEO had jurisdiction to investigate the matter. *N.J.A.C.* 4A:7.3-2(p) provides that a complainant may file an external discrimination complaint **in addition** to the internal procedures under the State Policy. However, there is nothing in the State Policy that prohibits the EEO from investigating a State Policy complaint once it becomes aware of an alleged violation of the State Policy. It is irrelevant that the EEO became aware of the alleged State Policy violation from a third party, the EEOC. This is akin to when a supervisor, and not the alleged victim, presents an allegation of a State Policy violation under *N.J.A.C.* 4A:7-3.2(d) to the EEO. Once the EEO becomes aware of the alleged State Policy violation, it is the EEO's responsibility to investigate the matter if the violation touches the State Policy. It is noted that C.C. has not cited any authority which indicates that the EEO was barred from performing an internal investigation due to the pending external complaint. Moreover, the EEO's investigation did not take away jurisdiction from the Civil Rights/EEOC investigation as that is a separate matter that is independent of the EEO's investigation.

Regarding the merits, it is noted that C.C. was not "demoted" as he claimed. In fact, he was not even bypassed in favor of a lower-ranked candidate. Instead, he was provisionally serving as a PS4, and the appointing authority chose to permanently appoint higher-ranked candidates, which is its right under the Rule of Three. Additionally, contrary to C.C.'s assertion that Civil Service rules provide preference to permanently appointing provisionals, a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. While it would be within an appointing authority's right to choose a reachable, but lower ranked candidate over a higher ranked candidate based on the successful service of a provisional appointment, there is nothing within Civil Service law and rules that mandates or even prefers a provisional appointee to be permanently appointed over another reachable candidate. This is especially so since higher-ranked candidates were chosen. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position to which he or she is occupying. See *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987).

In this matter, the investigation revealed that the appointing authority chose to appoint another candidate because it indicated that C.C. did not interview well, the other candidate had certain experience that was needed for the position, and the other candidate was ranked higher on the Civil Service examination. In other words, the appointing authority provided legitimate business reasons why it chose to permanently appoint other candidates. It is noted that although there is nothing in

the record that indicates that C.C.s pending discipline had any impact on his non-appointment, a pending discipline, as long it was not based on invidious motivation, could also be a valid reason to not appoint a candidate in favor of another candidate.

Regarding R.N.'s reintroduction to the unit, it is noted that the investigation revealed that the appointing authority took C.C.'s allegation against R.N. seriously as it initially sought to remove her and did ultimately subject her to major discipline. Further, it explained that while it considered reassigning her to another unit, it decided to reintroduce her to the unit because it thought that such a reassignment could be considered retaliatory since she was already disciplined. Moreover, the appointing authority indicated that it was its preference that C.C. not transfer units and offered to move his seat to limit his interaction with R.N. Additionally, it gave C.C. the opportunity to present a recommendation on how the situation could be accommodated. However, C.C. chose to be reassigned under the circumstances. While C.C. clearly disagrees with the appointing authority's decision to reintroduce R.N. to the unit while he was still working there, 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). C.C. has not provided one scintilla of evidence that the appointing authority's actions were based on retaliation and/or gender discrimination. Merely speculation, without evidence, is insufficient to substantiate a State Policy violation. *See In the Matter of T.J.* (CSC, decided December 7, 2016).

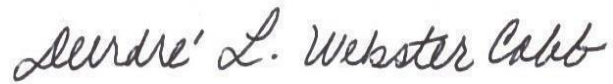
With respect to the time frames of the investigations, as the initial complaint and the subject complaint were both determined within 180 days, the determinations were handled within the time prescribed under the State Policy. Additionally, the EEO explained that it proceeded with the current investigation without interviewing C.C. as he indicated that he did not have anything to add and it had C.C.'s allegations from his Civil Rights/EEOC complaint. On appeal, C.C. has not presented one witness, document or any other evidence that the EEO did not consider that could potentially change its determination. As such, there is no basis to transmit this matter to the OAL for a hearing. However, it is noted that if the charges against C.C. are sustained and he is subject to major discipline, he may be able to pursue that action via his union via its collective negotiations agreement with the State of New Jersey.

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 21ST DAY OF OCTOBER 2020



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