STATE OF NEW JERSEY

In the Matters of E.H., Department of Banking and Insurance	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Discrimination Appeals
CSC Docket Nos. 2016-4540 and 2017-1326	:	

ISSUED: FEBRUARY 28, 2020 (HS)

E.H., a former Investigator 2 with the Department of Banking and Insurance (DOBI),[1] appeals the respective determinations of the Assistant Commissioner and Deputy Chief of Staff, which found that the appellant failed to present sufficient evidence to support findings that she had been subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). These appeals have been consolidated due to common issues presented.

The appellant, an African-American female, filed complaints with the Office of Equal Employment Opportunity/Affirmative Action (EEO/AA) alleging discrimination based on race and gender against V.D., Chief of Investigations, an African-American male, and discrimination based on retaliation against V.D. and I.B., a Legal Specialist at the time. The appellant alleged that V.D. discriminated against her based on race and gender by issuing a "class banishment" on June 10, 2015, which was to be effective until January 2016. The alleged banishment resulted from the appellant's opting out of a voluntary mediation training seminar on the first day of class, June 2, 2015. She further alleged that on March 31, 2015, V.D. issued an "official verbal warning" to her for downloading unauthorized software, *i.e.*, the Firefox browser, to her computer and did not punish another employee for the same offense. Additionally, the appellant alleged that V.D.'s class banishment and his involvement in a disciplinary action, a three-day suspension, issued in October 2015 based on the same unauthorized software download were retaliatory. The appellant also alleged that I.B. retaliated against her by being

[1] The appellant remains in State service but is now employed elsewhere.

"abrasive" and treating her unfairly in the course of the disciplinary proceedings. In response, the EEO/AA conducted investigations, during which individuals were interviewed and relevant documentation was reviewed and analyzed.

The EEO/AA stated, more specifically, that the appellant alleged that V.D.'s actions towards her were discriminatory in nature due to her gender in that she stated that he did not like her challenging him as a female subordinate. She stated that initially, V.D. had wanted to ban her from taking any other classes until January 2016 due to her failure to attend the mediation seminar, which she thought was voluntary. She also felt that V.D. overstepped his authority when he claimed that her banishment from classes was in lieu of disciplinary action related to the Firefox download. The investigation revealed that in June 2015, V.D. indicated that the appellant would not take any non-mandatory classes from that time until the end of 2015. The investigation found that this "ban" from classes was removed sometime in the fall of 2015. The motivation for this request that she not take any further non-mandatory classes until 2016 resulted from her failure to attend the mediation seminar for which she signed up and to provide notice to Human Resources (HR), on the morning of the first day, that she could not attend the class. The investigation did not substantiate gender as a motivation for this ban imposed by V.D. Further, the investigation found that her disciplinary action resulting from her download of the Firefox browser was not the result of actions by V.D. Therefore, the investigation did not substantiate a violation of the State Policy based on gender by V.D.

Additionally, at a grievance meeting, the appellant alleged that V.D. treated her differently based on race because another employee who downloaded Firefox was not initially disciplined. When she met with the EEO/AA, she stated that she felt V.D.'s "actions were discriminatory in nature, even though [she] cannot say that it was because of [her] race." The investigation did not find evidence that V.D.'s actions resulted in disciplinary charges filed against her. Further, other employees who downloaded Firefox were issued similar disciplinary actions. The investigation found that disciplinary actions are issued through the HR Office and would be documented in writing by that office. The investigation did not substantiate that V.D. violated the State Policy based on race.

With respect to retaliation, the appellant alleged that V.D.'s actions were retaliation for her April 2015 report that V.D. discriminated against her. The investigation found that no such report was made and that V.D. had not recommended her for discipline in any way. The investigation did not corroborate that V.D. knew the appellant had complaints against him implicating the State Policy when he imposed the class banishment or that the banishment was a result of a prior EEO/AA complaint. As to I.B., the investigation found no evidence that I.B. knew of the appellant's complaint against V.D. prior to the appellant's disciplinary action and the filing of her grievance. While the appellant may have

been uncomfortable with I.B.'s zealous representation of management in her hearings, I.B's conduct did not implicate the State Policy.

On appeal to the Civil Service Commission (Commission), the appellant recounts that on or about March 30, 2015, she was informed by Information Management Services (IMS) that she had unauthorized software, Firefox, installed on her computer and that one of her supervisors would have to request it from IMS if she wanted it. She then uninstalled the software and went to V.D.'s office and told him about the conversation with IMS. The appellant told him she uninstalled Firefox from her computer and requested that he obtain Firefox for her. During her conversation with V.D., N.M., an Investigator 2 at the time, a Caucasian female, told them that IMS had also instructed her to remove Firefox from her desktop computer two to three months earlier because she did not obtain authorization for the download and that she would have to have a supervisor request it for her. The appellant emphasizes that V.D. then told *both* of them that he would look into *their* requests for Firefox.

According to the appellant, on March 31, 2015, V.D. held a formal meeting with her and her direct supervisor A.V., Investigator 1, and informed them that he was issuing her an official verbal warning[2] to not download anything to her computer again. During this meeting, she told V.D. that N.M. had just told him that she had previously downloaded Firefox to her computer as well and that no reprimand of any kind took place. V.D. then repeated that he was issuing her an official verbal warning and then informed A.V. that they would both meet with N.M. about her download once she returned from vacation. When N.M. returned from her vacation, the appellant witnessed V.D. meeting with N.M. at N.M.'s workstation and overheard him telling N.M. that he was issuing her an official verbal warning to not download anything else. A.V. was not present when this meeting took place.

The appellant recounts that around mid-April 2015, HR personnel D.F., an Administrator Employee Relations at the time, and J.Z., Personnel Assistant 2, contacted her for a meeting. Once there, D.F. presented her with a Preliminary Notice of Disciplinary Action (PNDA) for a three-day suspension for the unauthorized download. The appellant then informed D.F. that V.D. had already issued her an official verbal warning for the download in the presence of A.V. According to the appellant, she also told D.F. that she felt that V.D. was being discriminatory when reporting employees to HR for disciplinary matters and informed her of the conversation that took place between her, N.M. and V.D. weeks earlier. The appellant opined that it was highly unlikely that IMS was being discriminatory by only reporting certain employees to HR over unauthorized installation of software simply based on the fact that N.M. told her and V.D. that

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[2] A warning is not considered discipline under Civil Service regulations. *See N.J.A.C.* 4A:2-2.2(a) and *N.J.A.C.* 4A:2-3.1(a).

IMS had instructed her two to three months earlier to uninstall Firefox, and she was never disciplined by HR over it. D.F. then stated to the appellant that V.D. did not have the authority to discipline employees and that she was not comfortable issuing the PNDA to the appellant. D.F. then withdrew the PNDA and advised that she would contact A.V. and V.D. to confirm the official verbal warning and would look into the appellant's claims further. D.F. also advised that once she confirmed V.D.'s official verbal warning to the appellant with A.V., she would contact the appellant's union to look into reducing the three-day suspension to an official written warning. The meeting was then concluded.

The appellant states that after meeting with HR, she contacted her union's Secretary and informed her of the entire matter. The Secretary later instructed the appellant to contact the union if HR requested another meeting. According to the appellant, from April 2015 to October 2015, HR never contacted her or her union about the PNDA that was presented in April 2015 and HR never reported her initial allegations of discrimination against V.D. to the EEO/AA. The appellant claims that this is evidenced by the fact that she never received any correspondence from the EEO/AA outlining her April 2015 allegations against V.D.

The appellant states that on June 10, 2015, V.D. held a meeting with her and A.V. and informed them that she was banished from taking any classes offered by DOBI from June 10, 2015 until January 2016 because she had failed to get permission from HR to opt out of the voluntary mediation training seminar due to her work backlog after she had initially agreed to attend. V.D. also informed her and A.V. that once she agreed to attend the voluntary class, her attendance became mandatory. The appellant repeatedly stated to V.D. that she wanted this "disciplinary action" in a written notice and that she wanted a copy of the policy he was acting under outlined in the notice. V.D. then instructed A.V. to draft her disciplinary notice and when A.V. questioned what policy he was referencing, V.D. again instructed A.V. to draft the disciplinary notice. The meeting was then concluded with all parties understanding that V.D. had banned the appellant from taking DOBI classes until January 2016. Shortly after this meeting, the appellant went to A.V.'s office to discuss the validity of the class banishment. V.D. then came into A.V.'s office uninvited and began to discuss the matter with them again. After some back and forth discussion over V.D.'s authority to ban the appellant from all classes offered by DOBI, the validity of the policy that he was acting under, and the appellant's requested written notice of discipline being placed into her personnel file, V.D. threatened that he could assure the appellant that G.S., Assistant Insurance Commissioner, his direct superior, could make it happen. The appellant again requested the discipline in writing and a copy of the policy he was acting under. V.D. then instructed A.V. not to draft her disciplinary notice and concluded the meeting by advising that he would meet with them the following week to discuss her requested disciplinary notice. The follow-up meeting never took place.

The appellant states that on September 10, 2015, A.V. contacted G.P., a former Employee Relations Coordinator, on her behalf and noted that G.P. had not yet followed up from an earlier discussion of August 27, 2015 regarding the appellant's class banishment and her request for a written notice of disciplinary action. On September 10, 2015, the appellant learned that V.D. had offered every Investigator within her unit an Excel training class when her unit's secretary included the appellant on an e-mail referencing that class. The appellant again requested her written notice of disciplinary action via A.V., and A.V. again informed G.P. of her request. On October 21, 2015, the appellant received an automated e-mail indicating that there were seven National Association of Insurance Commissioners webinar classes scheduled for October and November 2015. The appellant again inquired about her written disciplinary notice via A.V. and requested that HR verify if webinar classes were included under the class banishment. HR never responded to the appellant or A.V.'s inquiries about the class banishment. On October 26, 2015, the appellant contacted her union representative, T.S., about the class banishment and V.D. and HR ignoring her requests for written disciplinary notice and a copy of the policy outlining class banishments. On October 27, 2015, the appellant met privately with T.S. and advised that she believed V.D. had received permission from G.S. to enforce the class banishment against her because HR had, for months, repeatedly refused to intervene on her behalf until she got her union involved. During this meeting, V.D. walked in uninvited and was informed by T.S. that he met with HR earlier that day and that the class banishment he enforced against the appellant was inappropriate and no longer in place. V.D. then stated to them that the class banishment he enforced was actually done in lieu of the appellant not receiving (to date) any discipline from HR over the Firefox matter. The meeting was then concluded with the understanding that the class banishment was no longer in place as of October 27, 2015. That same date, V.D. issued a memo to G.S. noting that the class banishment he enforced against the appellant was no longer in place. On October 28, 2015, HR issued PNDAs against the appellant and N.M. respectively for three-day suspensions for the unauthorized download of Firefox. The appellant's PNDA stated that IMS informed HR of the appellant's unauthorized download in March 2015 and N.M.'s PNDA stated that IMS informed HR of N.M.'s unauthorized download in January 2015. N.M. was never issued or presented with a PNDA prior to October 28, 2015, and she was never contacted by HR after IMS purportedly informed them of her download in January 2015.

The appellant states that on October 29, 2015, she contacted T.S. regarding the PNDA she received the day before and V.D.'s previous statement to them that the class banishment was done in lieu of her not receiving any discipline from HR over the Firefox matter. On November 9, 2015, the appellant appealed the PNDA and noted V.D.'s official verbal warning to her in April 2015, V.D.'s class banishment enforced against her from June 2015 to October 2015, and his statement to her and T.S. on October 27, 2015 that he enforced the class

banishment against her in lieu of her not receiving (to date) any discipline from HR over the Firefox matter. On November 25, 2015, the appellant filed a grievance against V.D. via her union. On December 28, 2015, I.B. issued a written response to her grievance and stated that the appellant was to adhere to an unknown/unwritten policy that mandates voluntary classes become mandatory once she agreed to attend. I.B. did not address her actual grievances against V.D. On December 31, 2015, the appellant appealed her grievance matter and requested that HR/I.B. supply a copy of the policy mandating voluntary to mandatory classes to her or her union. To date, no copy of this policy has been provided. On February 2, 2016, the appellant's grievance hearing was held with a decision made on February 16, 2016. That decision was appealed. In February 2016, the appellant's discipline hearing was held, and she was subsequently suspended from work for three days in March 2016. The discipline matter was also appealed. On March 29, 2016, I.B. confirmed via email that HR shredded the PNDA presented to her in April 2015 and that they did not retain a copy for her personnel file.

The appellant states that she is confounded as to how it was determined that the investigations did not substantiate that V.D. violated the State Policy based on gender and race. The appellant notes that she is an African-American woman and argues evidence reflects that V.D. violated the State Policy by enforcing a class banishment against her because she had not (to date) received any disciplinary action from HR over the Firefox matter. V.D., according to the appellant, has never acted on HR's behalf by issuing discipline to an employee, and reliance upon the practice that disciplinary actions are only issued and documented through HR does not absolve V.D. of his issuance of discipline to her. The appellant reiterates that V.D.'s actions were also retaliatory. Furthermore, the appellant contends that evidence reflects that HR/I.B. attempted to enforce an unknown/unwritten "policy" against her (and only her) mandating that voluntary classes become mandatory once she agreed to attend and that this was also retaliatory. Specifically, she cites the following excerpt from I.B.'s Step One decision on behalf of management: "[O]nce [the appellant] signed up for the mediation training, her attendance was expected; thereby making it mandatory and not voluntary."[3]

Additionally, according to the appellant, evidence reflects that HR destroyed a document directly related to her initial allegations of discrimination against V.D.,

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[3] This excerpt was taken from a paragraph in the decision that states as follows:

> It is Management's position that [the appellant] had no authority to "opt out" of the mediation training on the morning of June 2, 2015, as it left no time for Management to arrange in advance for a replacement to fill [the appellant]'s slot. Moreover, it is Management's position that once [the appellant] signed up for the mediation training, her attendance was expected; thereby making it mandatory and not voluntary. [The appellant]'s last-minute, unexpected absence caused difficulties insofar as that the mediation training was geared towards a certain number of attendees, as the training was interactive in nature.

i.e., the PNDA presented in April 2015, and that it never retained a copy for her personnel file as required by *N.J.A.C.* 4A:7-3.1(g)[4] or forwarded a copy to the EEO/AA. Further, the appellant maintains that the EEO/AA should have interviewed N.M., A.V. and T.S. in investigating her retaliation claims. According to the appellant, N.M., for example, would have provided a statement regarding her conversations with V.D. and her knowledge of the class banishment. In support, the appellant submits various exhibits.[5]

In response, the EEO/AA states that during the April 2015 meeting between the appellant, D.F. and J.Z., D.F. denied that V.D. had anything to do with the issuance of the three-day suspension. During the investigation, both D.F. and J.Z. denied ever hearing the appellant say, during the April 2015 meeting, anything to the effect that V.D. was being discriminatory when referring employees to HR for disciplinary matters. During the appellant's interview with the EEO/AA on January 6, 2016, the appellant failed to allege that she told D.F. and J.Z. in the April 2015 meeting that she felt V.D. discriminated against her. The EEO/AA states that the appellant never received any written document that would constitute discipline in relation to the class banishment. The EEO/AA states that V.D. recalled that the banishment was actually an agreement between him and the appellant that she would not take any more classes until she reduced her pending cases or the first of the new year, *i.e.*, 2016, whichever came first. The EEO/AA maintains that Investigators know their caseload, and the appellant could have informed her superiors that she had too much work and could not attend the class, a three-day seminar conducted by an outside agency, well in advance of the first day. The "ban" was not considered a disciplinary action. Moreover, even according to the appellant, the "ban" ended in mid-October 2015. V.D. denied any involvement in the disciplinary action related to the Firefox matter. HR confirmed that V.D. was not involved in the disciplinary action against the appellant, a three-day suspension. Further, other employees including N.M. received the same discipline for the unauthorized downloading of software.

The EEO maintains that the appellant's status of being an African-American woman does not necessarily lead to conclusions of gender or race discrimination without facts on which to base such a conclusion. V.D. is an African-American male. Simply because he is a man does not mean his actions are discriminatory against a female subordinate. V.D., in the EEO's view, had legitimate business reasons to tell the appellant not to take any more classes until she reduced her caseload or the first of the new year, whichever came first. According to the EEO, there is no dispute that the appellant signed up for the mediation seminar and that the appellant herself asked, on the morning of the first day, to not attend because of her workload. The appellant failed to get approval to not attend, and she in fact did

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[4] This provision of the State Policy provides that each State agency is to maintain a written record of the discrimination/harassment complaints received.

[5] It is noted that several of the exhibits are e-mails or statements by N.M., A.V. or T.S.

not attend. V.D. admitted to meeting with the appellant about her unilateral decision not to attend. V.D. admitted that he told her she cannot sign up for anymore classes until she reduced her caseload or the first of the new year. However, the EEO maintains, this "class ban" is not considered a disciplinary action.

The EEO explains that the appellant was a member of the International Federation of Professional and Technical Engineers (IFPTE) and any disciplinary action was governed by the agreement between the State and IFPTE, which states that discipline means "official written reprimand, fine, suspension without pay, record suspensions, reduction in grade or dismissal from service, based upon the personal conduct or performance of the involved employee." Further, an appointing authority or his designee who wishes to impose discipline must give written notice of such discipline to the employee. In this case, the appellant was not issued a disciplinary action by V.D. The appellant actually filed a grievance related to the "class ban" so, the EEO maintains, she was afforded her rights under the IFPTE contract. However, the EEO maintains, even if V.D. were allowed to issue disciplinary action to the appellant for not attending class, there is no evidence that V.D.'s actions were based on race or gender.

Turning to the issue of the alleged retaliation, the EEO/AA states that I.B.'s role was to be the voice for management at the appellant's disciplinary hearing and grievance procedure. Regarding V.D., his actions did not lead to the appellant's three-day suspension; it was IMS that discovered the inappropriate download and reported it to HR; and HR imposed the discipline. The EEO/AA maintains that V.D. could not have retaliated against the appellant in violation of the State Policy as the end of the class banishment and issuance of the PNDA both occurred in October 2015, but the appellant's first meeting with the EEO/AA was not until January 2016.

With respect to the issue of witnesses in the retaliation investigation, the EEO/AA states that the investigation included interviews with the appellant, the respondents and two other witnesses and a review of approximately 50 pages submitted by the appellant. The EEO/AA maintains that the scope of the investigation did not require interviews of the individuals the appellant named. In support, the EEO/AA submits various exhibits.[6]

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[6] The EEO/AA has also voiced its concern that among the appellant's exhibits are investigative materials related to her duties. It states that under *N.J.S.A.* 17:22A-43b, *N.J.A.C.* 11:17-2.16(b)6 and *N.J.A.C.* 11:1-37.17(b)6, these are confidential and privileged materials concerning banking and insurance. However, the Commission lacks jurisdiction to enforce those provisions. Nevertheless, the Commission notes that appeal files in any Commission matter, including written submissions of the parties and all other related documentation used to make an administrative determination in the matter, are not considered government records subject to public access pursuant to the Open Public Records Act. *See N.J.A.C.* 4A:1-2.2(c)1.

In reply, the appellant reiterates her claims and urges the Commission to impartially and thoroughly review her appeals.

CONCLUSION

It is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. *See N.J.A.C.* 4A:7-3.1(a)3. The protected categories include 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. *See N.J.A.C.* 4A:7-3.1(a). Additionally, retaliation against any employee who alleges that she or he 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 be the subject of other retaliation. *See N.J.A.C.* 4A:7-3.1(h). The State Policy is a zero tolerance policy. *See N.J.A.C.* 4A:7-3.1(a). Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C.* 4A:7-3.2(m)4.

The Commission has conducted a review of the record in these matters and finds that adequate investigations were conducted and that the investigations failed to establish that the appellant was discriminated against in violation of the State Policy. As discussed below, the EEO/AA appropriately analyzed the available documents and witness statements in investigating the appellant's complaints and concluded that there was no violation of the State Policy based on race, gender or retaliation.

The appellant maintains that race and gender discrimination and retaliation occurred because V.D. instituted a class banishment against her in June 2015 due to the appellant's attempt to withdraw from a mediation training seminar shortly before it started and failure to obtain permission to withdraw and because she had not, until that time at least, received discipline for her unauthorized software download. The EEO/AA describes V.D.'s actions differently, stating that V.D. told the appellant she could not sign up for classes until she reduced her caseload or the new year, whichever came first. Whatever V.D's motivations were and regardless of his authority to take such action, no substantive evidence has been presented to question the EEO/AA's conclusion that the appellant's race, the appellant's gender and any allegation of discrimination made by the appellant were not motivating factors. With respect to the appellant's three-day suspension for her unauthorized

software download, no substantive evidence has been presented that V.D. was involved in the issuance of this discipline. Moreover, N.M., the Caucasian employee identified by the appellant who had also downloaded unauthorized software, received the same discipline.

With respect to the claim of retaliation by I.B., the appellant cites a portion of I.B.'s Step One decision on behalf of management stating that once the appellant signed up for the seminar, her attendance was expected. However, the cited portion viewed with additional context indicates that it was in fact based upon the appellant's attempt to withdraw from the seminar. In this regard, the full paragraph in which the cited portion may be found reads as follows:

> It is Management's position that [the appellant] had no authority to "opt out" of the mediation training on the morning of June 2, 2015, as it left no time for Management to arrange in advance for a replacement to fill [the appellant]'s slot. Moreover, it is Management's position that once [the appellant] signed up for the mediation training, her attendance was expected; thereby making it mandatory and not voluntary. [The appellant]'s last-minute, unexpected absence caused difficulties insofar as that the mediation training was geared towards a certain number of attendees, as the training was interactive in nature.

Given the context for I.B.'s statement and the lack of any evidence to suggest that I.B.'s true motivation was to retaliate against the appellant for having alleged discrimination, there is no basis to question the EEO/AA's conclusion that I.B. did not retaliate against the appellant in violation of the State Policy.

Additionally, the investigation revealed that D.F. and J.Z., the HR employees who met with the appellant in April 2015, did not hear the appellant allege discrimination against V.D. during that meeting. In addition, the appellant did not mention during her interview with the EEO/AA in January 2016 that she had reported an allegation of discrimination by V.D. to D.F. and J.Z. As such, there is no substantive evidence that DOBI failed to retain a written record of a discrimination complaint or that any employee with an obligation to refer allegations of discrimination to the EEO/AA failed to comply with such obligation.

As to the appellant's contention that additional witnesses should have been interviewed as part of the retaliation investigation, the appellant has not persuasively explained how the information they could have provided would have materially altered the outcome of the investigation. Moreover, the appellant has had a full opportunity to present evidence and arguments on her behalf in these appeals, and several of the appellant's exhibits are in fact e-mails or statements authored by individuals the appellant believes should have been interviewed.

Based on the foregoing, the investigations were thorough and impartial, and no substantive basis to disturb the EEO/AA's determinations has been presented.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 26TH DAY OF FEBRUARY, 2020

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