



STATE OF NEW JERSEY

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

In the Matter of F.C., Office of the
Public Guardian, Department of
Human Services

Discrimination Appeal

CSC Docket No. 2020-730

ISSUED: May 1, 2020 (HS)

F.C., a former Administrative Analyst 4, Fiscal Management with the Office of the Public Guardian (OPG), Department of Human Services,¹ appeals the determination of the Chief of Staff, which found that the appellant failed to present sufficient evidence to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, an African-American male, filed a complaint with the Division on Civil Rights alleging discrimination based on race, gender and retaliation. Specifically, the appellant alleged that OPG terminated him in retaliation for filing a complaint against I.H., a Temporary Employment Services employee and Caucasian female, and for the purpose of replacing him with two Caucasian females. The Office of Equal Employment Opportunity (EEO) received the complaint and conducted an investigation, during which it conducted three interviews and reviewed 11 relevant documents.

The EEO did not substantiate the allegation of retaliation. Specifically, the appellant admitted that his entire complaint against I.H. was contained in an e-mail he sent to the Human Resources Manager. The complaint contained no discrimination allegation. The appellant also admitted that he never filed a prior discrimination complaint and never participated in a prior discrimination

¹ The appellant separated from State service effective November 9, 2018.

investigation. Thus, the retaliation allegation did not meet the standard for discriminatory retaliation. The EEO also did not substantiate the allegations of race and gender discrimination. The appellant admitted that his only evidence was that OPG replaced him with two Caucasian females, I.H. and A.C., a Guardianship Services Specialist 1. The investigation found that their titles had not changed since the appellant's termination. They assumed some of the appellant's duties, which they performed in addition to their own, and accrued no benefit from assuming those duties. The appellant's former position had not been posted. Handwritten notes, statements and e-mails documented meetings held with the appellant to address the following deficiencies with the appellant's work performance: unpaid taxes; late or no-show status for meetings with Social Security; supervisor complaints; poor provider relations; care manager complaints; failure to communicate and respond to inquiries; failure to reconcile bank accounts; and returned checks for insufficient funds. The EEO determined that the evidence showed that OPG terminated the appellant for those reasons, which constituted adequate cause, and that race and gender played no part in the decision.

On appeal to the Civil Service Commission (Commission), the appellant states that his retaliatory termination² occurred about three weeks after his complaint against I.H. over an "offensive remark"³ she made towards him during a meeting with other employees present. The appellant maintains there was no adequate cause for his termination and presents arguments concerning each of the identified performance issues. On the issue of unpaid taxes, the appellant concedes there was a tax period when he failed to have year-end tax liabilities paid in a timely manner for a handful of clients, resulting in interest and penalties being charged to those clients. Although the appellant accepts responsibility for the oversight, he does not believe it in itself is adequate cause for termination. On the issue of late or no-show status for meetings with Social Security, the appellant disputes that he was consistently late. If he did not show, that meant he was off that day. On the issues of supervisor complaints, poor provider relations, and care manager complaints, the appellant proffers that these all were actually the result of a combination of an increased client base, a reduced workforce, and a decrease in operational effectiveness. On the issue of failure to communicate and respond to inquiries, the appellant maintains that as he was being pulled in so many directions and overworked, the circumstances were bound to result in being unable to address all matters in a manner sufficient for all stakeholders. On the issue of returned checks for insufficient funds, the appellant states his belief that the issue stemmed from a time when he was given just a few days to learn a complicated task, not part of his normal duties, with minimal support. The appellant states that the matter was resolved with the bank and believes no fees for non-sufficient funds were charged.

² While the appellant argues his termination was retaliation prohibited by the Conscientious Employee Protection Act (CEPA), the Commission has no jurisdiction to enforce CEPA. *See N.J.S.A. 34:19-1, et seq.*

³ On appeal, the appellant did not indicate what the remark was.

On the issue of failure to reconcile bank accounts, the appellant denies that reconciling bank accounts was even part of his job description and believes he may have been scapegoated. The appellant further claims that during his time with OPG, he was never given a Performance Assessment Review (PAR). Thus, the appellant requests reinstatement with full benefits and back pay.⁴

In response, the EEO states that the appellant held an unclassified position⁵ and thus was an at-will employee. Witnesses indicated that the appellant was informed of his deficiencies before his termination. The EEO contends that although the appellant responded to OPG's concerns over those deficiencies, the only issue before the Commission is whether the investigation into the allegations of discrimination and retaliation was conducted properly. It maintains that it appropriately found no State Policy violation.

CONCLUSION

Initially, the Commission notes that the appellant, a State unclassified employee, was covered by the State Policy and was entitled to challenge the finding that there was no State Policy violation. *See N.J.A.C. 4A:7-3.1(a)1* and *N.J.A.C. 4A:7-3.2(m)*. Thus, the Commission does have jurisdiction to review the specific finding that the appellant's termination did not constitute a State Policy violation.

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

⁴ The appellant also seeks "payment for emotional distress," but this is not a remedy the Commission has any authority to provide. *See N.J.A.C. 4A:2-1.5*.

⁵ This was apparently by statute. *See N.J.S.A. 52:27G-25(c)* (providing, in relevant part, that the Public Guardian may appoint, retain or employ any officers, financial managers, or other professionally qualified personnel without regard to the Civil Service Act). Agency records reflect that the appellant served in unclassified positions throughout his State service.

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 this matter and finds that an adequate investigation was conducted and that the investigation failed to establish that the appellant was discriminated against in violation of the State Policy. The EEO appropriately analyzed the available documents and information provided by witnesses in investigating the appellant's complaint and concluded that there was no violation of the State Policy based on race, gender or retaliation. On appeal, the appellant reiterates his claim that his termination was in retaliation for his complaint over an "offensive remark." The precise nature of the remark and what exactly made it offensive to the appellant are not apparent from the record. Crucially for this appeal, there is nothing in the record to suggest that the complaint was over an alleged *discriminatory* remark. Thus, there is no basis to question the EEO's conclusion that in terminating the appellant, OPG did not retaliate against him in violation of the State Policy. Based on the foregoing, the investigation was thorough and impartial, and no substantive basis to disturb the EEO's determination has been presented.

The Commission adds the following comments. Although the appellant complains of never receiving a PAR, Civil Service regulations do not strictly require the inclusion of unclassified employees in the PAR program. *See N.J.A.C. 4A:6-5.1(b)1.* Additionally, while the Commission had jurisdiction to review the specific issue of whether the appellant's termination constituted a State Policy violation as discussed earlier, the Commission does not have jurisdiction to review the distinct issue of whether the termination, in and of itself, was an appropriate disciplinary penalty for the identified performance deficiencies, as the appellant was an unclassified employee. *See N.J.S.A. 11A:2-6 and N.J.A.C. 4A:2-2.1* (providing, in relevant part, that the Commission may only review permanent career service employees' appeals of their removals). It is only when an unclassified employee, who has underlying permanent status, is removed from employment that the employee may have the right to file an appeal of that discipline to the Commission.⁶ However, the appellant had no underlying permanent status as he was an unclassified employee for the duration of his State service. Accordingly, the Commission can render no determination as to whether termination was an appropriate penalty.

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.

⁶ Such employee would not have a right of appeal to the Commission where, for example, a collective negotiations agreement dictates a different appeal procedure. *See N.J.S.A. 11A:2-14.*

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF APRIL , 2020

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

c. F.C.
Pamela Conner
Mamta Patel
Records Center