STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of P.L., Department of Transportation

CSC Docket No. 2019-1215

Discrimination Appeal

ISSUED: FEBRUARY 23, 2021 (ABR)

P.L., a Crew Supervisor, Building and Grounds with the Department of Transportation (DOT), appeals the determination of the Acting Director of the Division of Civil Rights and Affirmative Action (DCR/AA), DOT, which found that he violated the State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, on or about March 2018, M.B., a Grounds Worker, filed a complaint with the DOT's DCR/AA, alleging that the appellant prohibited him from using rideable equipment due to his age.

In response to the complaint, DCR/AA conducted an investigation which consisted of the interview of the appellant and three other witnesses, as well as the review of relevant documents. DCR/AA also held two meetings with staff from the DOT's Division of Human Resources (DOT Human Resources), plus one meeting with a representative from the DOT's Bureau of Safety. The appellant told DCR/AA that he restricted M.B. from using ridable equipment because of safety concerns for visitors and workers at the Deepwater Rest Area. Namely, he indicated that he was concerned about M.B.'s vision and hearing and that he was waiting for DOT Human Resources to have M.B.'s ability to operate equipment a State physician evaluate before allowing him to use that equipment again. DCR/AA maintained that, contrary to the appellant's assertion, DOT Human Resources had not been apprised of the subject restrictions and was not in the process of getting M.B. medical clearance to use ridable equipment at the time of DCR/AA's investigation. DCR/AA further indicated that it was not standard practice at DOT to prohibit an employee from using equipment, except in cases where the employee had a medical restriction. DCR/AA found that M.B. had an up-to-date medical clearance to perform all of his job duties.

DCR/AA also indicated that the appellant stated that M.B. should retire when he made management aware that he was going to prohibit M.B. from using ridable equipment following an accident.[1] DCR/AA concluded that the appellant subjected M.B. to differential treatment as a result of his age when he caused M.B. to lose his preferred work assignments because of the restriction at issue. As a result, corrective action was taken. Specifically, a written warning was issued to the appellant.

On appeal to the Civil Service Commission (Commission), the appellant asserts that his decision to remove M.B. from ridable equipment was based on his exhibition of hearing and vision impairments, and his failure to demonstrate competency in operating that equipment. The appellant emphasizes that he made this decision on March 21, 2018 after M.B. was involved in three incidents involving ridable equipment within a short timeframe. The appellant avers that he took this action because of safety concerns and his responsibilities as a supervisor, and he denies that M.B.'s age was ever a topic of discussion during this process. Finally, the appellant denies stating that M.B. should retire.

In response, the DCR/AA asserts that the record establishes that the appellant violated the State Policy by subjecting M.B. to differential treatment on the basis of his age, namely by imposing a restriction which caused M.B. to receive less favorable work assignments, such as cleaning restrooms. By way of background, DCR/AA indicates that M.B. was involved in two separate incidents on March 6, 2018 and a third incident on March 21, 2018[2], when he was 73 years old. The first incident on March 6, 2018 involved M.B.'s negligent use of a plow truck to open a gate instead of getting out of the truck he was operating to open it. The second March 6, 2018 incident involved M.B. getting his vehicle stuck in grass and incurring a blown transmission after he negligently drove down an unplowed exit road instead of using a plowed exit road. In the March 21, 2018 incident, M.B. backed the State vehicle he was operating into another State vehicle, causing damage to a tailgate. After these three incidents, the appellant prohibited M.B. from using ridable equipment. DCR/AA states that the DOT's Accident Review Board (ARB) reviewed the first March 6, 2018 incident involving M.B.'s use of a vehicle to open a gate and the March 21, 2018 collision. DCR/AA submits that the ARB found the first incident to be "not reviewable"[3] and that the March 21, 2018 collision was reviewable. It further determined that M.B. "[f]ailed to exercise proper precaution and/or make proper observation when backing" up on March 21, 2018.

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[1] DCR/AA has not described the full context in which this remark was made and it is unclear whether it found that it also constituted a violation of the State Policy.

[2] In its initial submissions in this matter, DCR/AA indicated that these incidents occurred in March 2017. However, the Commission observes that documentation submitted by the appointing authority's Division of Human Resources demonstrates that these incidents occurred in March 2018.

[3] The Commission notes that documentation furnished by the appointing authority in this matter states that the ARB deemed the subject March 6, 2018 accident non-reviewable because it involved less than $1,000 in damage to a DOT vehicle.

DCR/AA maintains that the appellant did not adhere to DOT policies when he prohibited M.B. from using ridable equipment, proffering that per a July 17, 2018 interview with R.T., Employee Relations Coordinator, the only process the DOT has related to this matter is a fitness for duty evaluation. R.T. stated that as of the time of the DCR/AA investigation, DOT Human Resources was not considering a fitness for duty evaluation for M.B. DCR/AA also presents that representatives from DOT Human Resources were not aware that M.B. was restricted from operating ridable equipment until as late as July 10, 2018. DCR/AA further indicates that neither the appellant nor DOT Human Resources was able to produce documentation to show that an official process had been initiated to prohibit or restrict M.B.'s use of ridable equipment. Moreover, DCR/AA submits that J.H., Director of Support Services, testified that she had instructed the appellant not to prohibit M.B. from using ridable equipment and was unaware that he had done so.[4] However, it notes that DOT Human Resources has since expressed support for the appellant's decision to prohibit M.B. from using ridable equipment.

Furthermore, DCR/AA contends that the contrast between the appellant's statements to its investigator and the record demonstrates that the appellant exaggerated safety issues and mischaracterized poor operator judgment as a pretext for age discrimination under the guise of a safety concern for M.B. In this regard, DCR/AA indicates that during his interview with its investigator, the appellant described M.B. as "not so good" because he didn't hear well and stated that he believed that M.B.'s vision was getting worse. DCR/AA proffers that this is a common stereotype for older people and it notes that M.B. had full medical clearance to perform his job with a hearing aid. DCR/AA maintains that age had an impact on the appellant's decision to prohibit M.B. from using ridable equipment, noting that the appellant issued the directive even though only one of the incidents proved to be a "true accident" and that it did not involve personal injury or recklessness. It asserts that the totality of the record demonstrates that the appellant's contention that M.B. was a safety risk to his coworkers and the public is "problematic and implausible." DCR/AA further submits that three other DOT employees were identified as having two accidents within the one-year period between April 2018 and April 2019 and that those employees were not prohibited from using ridable equipment. Accordingly, DCR/AA maintains that the foregoing demonstrates that the appellant discriminated against M.B. on the basis of his age.

In response to the Civil Service Commission's (Commission) request for further information regarding the appointing authority's policies for barring an employee from using ridable equipment, DCR/AA has furnished a statement from the appointing authority. The appointing authority expresses support for the appellant's decision to prohibit M.B. from using ridable equipment. The appointing authority states that it does not have a written policy for fitness for duty examinations. Rather, it indicates that it reviews requests on a case-by-case basis. It submits that a State

[4] DCR/AA has not indicated when J.H. gave this direction to the appellant.

physician determined in 2010 that M.B. needed to use a hearing aid at all times and that he required the use of eyeglasses while driving. DOT Human Resources states that it received reports of concern regarding M.B.'s behavior in March 2017. Specifically, DOT Human Resources received reports that M.B. was having difficulty hearing, to the point that it was necessary to use a raised or shouting voice when speaking with him. He had also been involved in two motor vehicle accidents and nearly had a third in that same year. Specifically, in 2017 he drove into a fence in one incident, scraped a dump truck against a loader in a second incident and nearly hit a building in a third event.[5] The appointing authority indicates that after these incidents, the DOT's ADA Coordinator met with M.B. to discuss his need to comply with the 2010 fitness for duty requirements and to submit medical documentation which indicated that he was clear to perform the functions of his position and that M.B. subsequently complied with this mandate. However, the appointing authority presents that after this clearance, M.B. was involved in the further accidents on March 6, 2018 and March 21, 2018 noted above. It adds, in relevant part, that M.B.'s actions on March 6, 2018 caused significant damage and disruption to plowing operations. Specifically, after M.B. became stuck by improperly utilizing an unplowed exit ramp on March 6, 2018, another member of the crew was required to stop his own plowing assignment to assist M.B. Furthermore, it states that because M.B. initially tried to free himself instead of calling for assistance, he damaged the transmission of the salt truck he was operating and rendered it undrivable. As a result, it required the DOT to replace the transmission of the salt truck—a $5,475.65 expense—and it left his yard without a salt truck for the following storm. The appointing authority states after that M.B. was involved in the subject incidents in March 2018, the appellant immediately notified management about his action, and that management, in turn, forwarded that information to DOT Human Resources to consider whether a fitness for duty evaluation was warranted. DOT Human Resources determined that the appropriate action was instead to address the issue administratively.[6] It further determined that management's actions were appropriate and in the best interest of the safety of the appellant's crew, the public and M.B., given the number of accidents, their severity and their close proximity.

In reply, DCR/AA states that it did not consider the disciplinary action taken against M.B. Rather, it focused on M.B.'s complaint and its investigation established that the appellant exaggerated safety issues and mischaracterized poor operator judgment as pretext for age discrimination under the guise of a safety concern for M.B., causing M.B. to receive less favorable work assignments, such as cleaning restrooms. It reiterates that even though M.B. was medically cleared to operate ridable equipment, the appellant continued to prohibit him from doing so. Moreover,

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[5] The appointing authority further states that management had also found in 2017 that M.B. had been using toilet cleaner to wash windows.

[6] Specifically, based on these accidents and an April 1, 2018 incident where a woman was locked in a restroom for more than five hours because M.B. failed to ensure that it was vacant before locking it for the evening, M.B. was suspended for 25 working days, effective January 2, 2019.

it observes that only one of the three March 2018 incidents was a "true accident," and it notes that that accident did not involve personal injury or recklessness. It avers that the record demonstrates that the appellant's proffered reason for his actions were pretextual and that he violated the State Policy by providing M.B. with less favorable assignments based upon his age.

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). 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.

In the instant matter, the Commission has conducted a review of the record and finds that it does not substantiate the DCR/AA's conclusion that the appellant violated the State Policy. The record shows that M.B. was involved in five accidents involving ridable equipment in 2017 and 2018, including three in short succession in March 2018. DCR/AA asserts that the appellant's reasons for modifying M.B.'s duties were pretextual and inconsistent with departmental policy. However, the record fails to establish that either of these assertions are true. Initially, although DCR/AA contends that the appellant prohibited M.B. from using ridable equipment because he relied on common stereotypes of older people having hearing and vision issues, the weight of the evidence shows that the appellant made his decision based on legitimate concerns about M.B.'s involvement in a series of accidents in March 2018. Moreover, it cannot be said that any potential concerns about M.B.'s vision or hearing following these events was baseless. As noted by the appointing authority, M.B. has been required to use a hearing aid at all times and wear eyeglasses while driving since 2010. The record further indicates that there were documented concerns about M.B.'s hearing in 2017. Furthermore, while DCR/AA relies on M.B. having been medically cleared to proceed with his normal duties after three incidents in 2017, the Commission observes that it does not mean that he remained fit to perform the same duties after the three incidents in March 2018. Moreover, the Commission does not find that the lack of personal injury or the ARB's conclusions show that the appellant exaggerated concerns when he barred M.B. from using movable equipment. In this regard, the documentation in the record indicates that the ARB deemed one accident non-reviewable because it involved less than $1,000 in damage to a DOT vehicle. Thus, it cannot be said that the ARB's determination that one of the incidents was

"non-reviewable" necessarily proves that there was no basis to be concerned about M.B.'s ability to safely operate ridable equipment. Therefore, the Commission finds insufficient evidence to conclude that any concerns about M.B.'s vision and hearing were stereotypical or pretextual in nature.

In addition, the Commission does not find that the record establishes that the appellant's action was inconsistent with DOT policy. Critically, the appointing authority has indicated that it does not have a written policy for fitness for duty examinations and that it instead reviews requests on a case-by-case basis. Additionally, it has expressed support for the appellant's action. The Commission observes that the three underlying incidents all occurred within the span of a month and that M.B.'s actions during one March 6, 2018 incident disrupted an ongoing snow removal operation, caused more than $5,000 in damage to a DOT vehicle and left his yard without a salt truck for the following snow event. Against this backdrop, the Commission finds it difficult to believe that, even if a supervisor does not believe that a medical condition contributed to a Grounds Worker's involvement in multiple accidents within such a short timeframe, that an appointing authority would find it unacceptable for a supervisor to modify the duties of that employee, pending a review of those events. Even assuming *arguendo* that the appellant's actions somehow violated a DOT policy, the Commission does not believe the record establishes a violation of the State Policy. As such, even if J.H. instructed the appellant not to prohibit M.B. from using ridable equipment after the underlying March 2018 accidents, it cannot be said that this fact demonstrates that the appellant violated the State Policy when doing so here.

Finally, it is unclear from the record whether DCR/AA considered the appellant's alleged statement that M.B. should retire constituted a separate State Policy violation. The Commission notes that the record does not detail the context in which the appellant allegedly stated that M.B. should retire, nor does it provide any detail. As such, the Commission is unable to find that the record substantiates such a conclusion in this matter.

ORDER

Therefore, it is ordered that this appeal be granted.

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 17TH DAY OF FEBRUARY, 2021

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