



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of M.D., Department of
Human Services

CSC Docket No. 2021-579

Discrimination Appeal

ISSUED: FEBRUARY 5, 2021 (SLK)

M.D., an Assistant Supervisor of Recreation with the New Lisbon Developmental Center, Department of Human Services, appeals the decision of an Assistant Commissioner with the Department of Human Services, which was unable to substantiate allegations that he was subjected to race discrimination in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, M.D., an African-American male, alleged that K.P., an Assistant Chief Executive Officer, Care Facility who is a Caucasian female, W.C., a Supervisor of Residential Services, Developmental Disabilities who is a Caucasian male, M.M., an Assistant Supervisor of Professional Residential Services, Developmental Disabilities who is a African-American female, L.K., a Program Specialist 2, Social/Human Services (PS2) who is a Caucasian female, and C.S., who is a Program Specialist 4, Social/Human Services who is a Caucasian female, reassigned him from the Recreation Center (Center) to Fern Cottage (Fern) and denied him a promotion to PS2 because he is African-American. As evidence, M.D. cited that L.K. was permitted to retain her office at the Center. M.D. also alleged that M.M., his supervisor at Fern, raised her voice twice to him because of his race or gender; however, the investigation indicated that M.D. provided no connection between her raising her voice and his race and gender.

Regarding M.D.'s reassignment, K.P. admitted being responsible for the reassignment. She indicated that the Center ceased functioning as a recreational outlet for residents, so she transferred all those who held recreational titles. K.P.

provided that L.K. was not recreation staff and not supervised by her and that her manager assigned her to an office in the Center. The investigation also revealed that L.K. was not involved in any decision to transfer M.D. Further, although M.D. named W.C. and C.S. as respondents because they were “part of the process,” the investigation revealed that K.P. was solely responsible for the decision to reassign him.

Concerning the allegation that he was denied a promotion because he is African-American, the investigation revealed that three candidates applied for the PS2 position. The interviewers were D.T., a Chief Executive Officer, Care Facility who is a Caucasian male, R.B, a Director of Nursing Services 1, Developmental Disabilities who is a Caucasian male, and S.W., a Quality Assurance Coordinator who is a Caucasian female. The candidates for the subject PS2 promotion were M.D., L.K., and K.D., a Behavior Support Technician who is a Caucasian female. The interviewers’ average scores were 19 for L.K., 13 for K.D., and 5.7 for M.D. Accordingly, the interviewers unanimously recommended L.K. for the position. The interviewers cited L.K.’s enthusiasm, good communication skills and creative ideas. As the investigation found that M.D. did not provide any evidence that the choice was based on race, the allegation was unable to be substantiated.

On appeal, M.D. asserts that he was reassigned from the Center to a less favorable work location (Fern) because he is African-American. He asserts that L.K. was not reassigned to Fern because she is Caucasian. M.D. explains that Fern is an unfavorable work location because there are over 30 individuals working there where social distancing during recreational activities can be challenging, while L.K. does not have his challenges. He explains that not only does he have to work with the same 30 or more individuals every day, he is being used as Direct Care where L.K. is not. M.D. indicates that his office used to consist of three people including himself and now it consists of four people with various other people moving in and out of his office. Further, he sits in the middle of four other people who are located within four feet of him. However, L.K. has an office exclusively to herself in the Center. M.D. presents that every person who was reassigned out of the Center to less favorable conditions was African-American and that L.K. was the only person who did not get reassigned. He asserts that his supervisory capacity has been diminished, while L.K.’s title and capacity has not. M.D. also presents that A.M.¹, a Music Therapist who is a Caucasian female, was reassigned to the Administration Building after her work location was closed and she does not work in a cottage, share an office space, or have to stay in a unit for eight hours per day.

Regarding K.P.’s statement that his title as an Assistant Supervisor of Recreation warranted his reassignment because there were no recreational activities that were being held at the Center, he asserts that this reason cannot be true. He presents that L.K. holds the title of PS2 as an Art Therapist. M.D. states that a PS2

¹ It is noted that A.M.’s record could not be located in personnel records.

Art Therapist is considered recreational. He states that L.K. is the only Art Therapist who previously did art therapy with individuals at the Center prior to COVID-19. However, her office is currently located in the Center and there are no programs being held in the Center. Concerning M.M., M.D. explains that she is one of the reasons that his current work location is unfavorable and he has submitted grievances. Further, he reiterates his claims that since W.C. and C.S. were part of the process, they are responsible as supervisors and managers for discriminating against him.

Concerning his non-promotion to PS2, M.D. states that the appointing authority claims that he only scored a 5.7 on his interview, which is why he was denied the promotion. Further, he believes that a 5.7 score means that he answered seven questions wrong. Therefore, M.D. questions why if he did this poorly on the interview, would he still be called in to interview for a PS3 position, which is a higher position. He presents that he has been a State employee for 30 years, including 26 years as a Supervisor with a Bachelor' degree and a Teacher's Certification. Therefore, M.D. believes that there is no way that he could have scored so low on the interview. He asserts that L.K. does not have his experience or his seniority. M.D. acknowledges that his personality may be flat at times as compared to a woman, but he states that he is certainly creative. He reiterates his claim that the reason he was not hired was because he was African-American. M.D. states that as he now has learned the reason for why he was not hired, he is not comfortable interviewing for the PS3 position. He is now claiming that D.T., R.B. and S.W., and all others involved in the interview and hiring process acted in a discriminatory manner.

In response, the Equal Employment Office (EEO) presents that K.P. admitted being responsible for M.D.'s reassignment. She indicated that the Center ceased functioning as a recreational outlet for residents, so she transferred all with recreational title. The investigation revealed that L.K. was not recreational staff, she was not supervised by K.P., it was L.K.'s manager that assigned her to an office in the Center and that decision was unrelated to M.D. or recreational personnel. Regarding the PS2 promotion, M.D. incorrectly assumes that he got seven questions "wrong" to receive a 5.7 score. The investigation revealed that the candidates were provided open-ended questions to elicit responses from each candidate about their experience, qualifications, ideas and goals. Each candidate was given the same questions and a candidate could score between zero and two on each question and each candidate had the potential to receive a total score between zero and 20 from each interviewer. Thereafter, the interviewers' scores were the averaged and L.K. had an average score of 19., K.D. had an average score of 13, and M.D. had an average score of 5.7. The EEO indicates that if M.D. applied for a PS3 position and he met the qualifications, he would be interviewed. Further, how M.D. performed on the PS2 interview does not determine if he is qualified to interview for the a PS3 position. The EEO asserts that M.D. has not provided one scintilla of evidence that anyone discriminated against him.

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 race is prohibited.

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.

In this matter, a review of the record indicates that M.D. was not promoted to a PS2 position in favor of L.K. because L.K. scored higher on the interview. Specifically, three interviewers cited L.K.'s enthusiasm, good communication skills, and creative ideas as to why she scored higher than M.D. He argues that based on his greater experience and seniority, there is no way that he could have scored as low as he did on the interview. Therefore, M.D. concludes that the reason that L.K. was promoted instead of him is that he is African-American and L.K. is Caucasian. However, even assuming *arguendo* that M.D. had more experience, seniority, or was otherwise "more qualified," choosing to promote someone with less seniority and experience because this candidate was determined to have more enthusiasm, good communication skills, and creative ideas is not a violation of the State Policy and is a decision based on a legitimate business reason. Further, even M.D. acknowledged that his personality may come across as "flat." Regardless, even if M.D. disagrees with the interviewers' assessments, 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). Moreover, M.D. has not provided one scintilla of evidence, such as a document or confirming witness, that the appointing authority's actions were based on unlawful discrimination. Mere speculation, without evidence, is insufficient to substantiate a State Policy violation. *See In the Matter of T.J.* (CSC, decided December 7, 2016).

Regarding M.D.'s reassignment from the Center to Fern, the record indicates that the Center ceased to be used for recreational purposes, and all employees holding recreational titles were reassigned to cottages. Further, the record indicates that L.K. was formerly an Art Therapist before being promoted to PS2, she has a different supervisor than M.D., and it was this different supervisor who made the decision that L.K. could remain in an office at the Center. Further, although M.D. characterizes L.K.'s former position as being a recreational position, the appointing authority indicates that L.K. is not considered to be recreational staff. M.D. also alleges that A.M. is an Art Therapist who was not reassigned to a cottage. In this regard, the record indicates L.K.'s and A.M.'s job locations were not in cottages, not because they were recreational staff who received favorable treatment due to their race, but because they were not considered recreational staff.

With respect to M.D.'s comments about the lack of social distancing at Fern, M.D. has provided no evidence that the office set-up at Fern was based on race and he should contact his department's human resources to discuss his concerns. Further, M.D. has provided no evidence that M.M.'s treatment of him was based on race and/or gender and he should continue to pursue his concerns with her through the grievance process.

In reference to M.D.'s statement on appeal, "[e]very person transferred out of the Community Center to less favorable conditions is Black." It is noted that there is nothing in the record that indicates that M.D. made this allegation in his complaint. As such, this statement was not investigated in the determination. However, as this is a new allegation that may touch the State Policy, this allegation is remanded to the EEO for further investigation.

ORDER

Therefore, it is ordered that this appeal be denied. However, this matter shall be remanded to the EEO for further investigation of the new allegation as described above.

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 3RD DAY OF FEBRUARY 2021

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