STATE OF NEW JERSEY

In the Matters of S.B., Department of Corrections	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket Nos. 2021-1415, *et. al.*	:	Discrimination Appeals

ISSUED: MARCH 25, 2022 (JET)

S.B., an Assistant Social Work Supervisor with the Department of Corrections, appeals the determinations of the Director of the Equal Employment Division (EED), Department of Corrections, which found that the appellant failed to support a finding that he had been subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). Since these matters concern similar issues, they have been consolidated herein.

COMPLAINT AGAINST A.R.

As background, the appellant filed an EED complaint, alleging that he was subjected to discrimination on the basis of his disability, and subjected to retaliation by his supervisor, A.R., a Social Work Supervisor 2, Secured Facilities. The appellant alleged that his supervisor subjected him to certain negative stereotypes based on her perception of his disabilities. The appellant also alleged that, since the time he filed a previous EED complaint, he was constantly subjected to discrimination and singled out in the workplace. In that regard, as evidence of discrimination, the appellant asserted that A.R. did not monitor L.H., an Assistant Social Work Supervisor, in the same way that she monitored his work and that he was advised shortly after filing a previous EED complaint that he had been suspended for 15 days on charges of conduct unbecoming a public employee. Additionally, the appellant submitted an April 5, 2019 letter from A.R. to L.C. where A.R. indicated she was "extremely concerned regarding [S.B.]" and that she felt "unsafe both at work and out of work

based on [her] interactions, observations, and conversations [with S.B.]. The correspondence also indicated that "Based on my experiences, I believe [S.B.] is irrational, unreasonable and I am concerned for myself and all the staff at [the facility]". Moreover, the appellant asserted that that his workload increased and that A.R. inappropriately claimed that the appellant invades her personal space when he stands close to her but permits others to do so without objection. The appellant also claimed that A.R. advised him that his assignments would not be reduced in order to accommodate him while on FMLA leave.

The EED conducted an investigation, including interviewing witnesses and the pertinent documentation, and it did not substantiate a violation of the State Policy. The EED did not corroborate that A.R. monitored L.H.'s work differently than the appellant's work. The EED also found that after he received a departmental hearing, the appellant was suspended for 15 days since it was substantiated that he shared confidential information about an inmate with a subordinate employee. With respect to the April 5, 2019 letter, the EED found that the appellant received a copy of the letter via discovery for his disciplinary hearing on November 12, 2019, and that he filed his EEO complaint on October 25, 2019. The EED indicated that the appellant acknowledged that his behavior may become irrational and unpredictable, which supported A.R.'s assertions in the April 5, 2019 letter. The investigation determined that while A.R. was on leave, her work was distributed amongst the employees in her unit, including the appellant, and as a result, the appellant's assignments were temporarily increased due to the operational needs of the workplace. The EED did not corroborate that A.R. allowed other employees to stand close to her without objection. Regarding his request for a reduced workload, the EED found that A.R. advised the appellant that his assignments could not be reduced based on his expected trainings and absences. Finally, the EED explained that, although the appellant and A.R. submitted prior EED complaints, there was no evidence to substantiate the appellant's allegations that he was subjected to retaliation or that he was singled out in the workplace based on that history.

COMPLAINT AGAINST L.C.

The appellant submitted an EED complaint alleging that he was discriminated against based on his familial status by L.C., a Director and member of the Senior Executive Service. Specifically, he asserted that in or around September 2020, L.C. denied his request to work from home to accommodate childcare/remote learning for his daughter, but that she previously permitted L.H. to work from home for medical purposes.

The EED conducted an investigation, including interviews and the review of pertinent documents, and did not substantiate a violation of the State Policy. The EED found that L.C. approved L.H.'s request to work from home in March 2020 in accordance with a COVID-19 program that was no longer in place when the appellant

requested to work from home in September 2020. Moreover, the EED interviewed L.C. and she denied the appellant's allegations with respect to his leave requests. As such, the EED determined there was no violation of the State Policy.

COMPLAINT AGAINST A.R. AND L.C.

The appellant filed an EED complaint alleging that he was discriminated based on disability and retaliation by A.R. and L.C. The appellant claimed that he was retaliated by L.C. due to his filing a previous EED complaint when she denied his request to use five vacation days during the course of a 15-day suspension he received for a non-EED matter. He also argued that A.R. assigned him birth certificate applications to review, which constituted additional work.

The EED investigated the matter and found that the appellant did not have an EED history with L.C., which is a threshold requirement for a claim of retaliation. Therefore, his claim against L.C. could not be substantiated. With respect to the use of vacation days in lieu of suspension days, the investigation found that this was offered as part of a settlement agreement for an unrelated disciplinary matter that the appellant rejected when he opted for a departmental hearing. Further, the 15-day suspension was upheld at the departmental hearing. Regarding the assignment of birth certificate applications, the investigation found that A.R. had a legitimate business purpose for assigning the appellant that duty. Finally, the EED did not substantiate the appellant's claim of retaliation by A.R. as there was no connection between the unsubstantiated allegations in this matter and the appellant's prior participation in another EED matter.

On appeal to the Civil Service Commission (Commission), the appellant asserts that the EED's determinations indicate that witnesses were interviewed and documentation pertinent to the investigation was reviewed, but despite his request, no relevant documentation was provided to him. The appellant explains that he cannot meet his burden of proof in this matter unless such information is provided to him. Further, the appellant contends that, although *N.J.A.C.* 4A:7-3.2 provides that the privacy of the parties involved shall be maintained, the EED could redact sensitive information to maintain the privacy interests of the parties. Therefore, the appellant argues that the Commission should only review information that is provided by the parties and admonish the EED for its failure to provide that information and order it to provide the investigatory materials. Additionally, the appellant maintains that the EED's determinations did not include a statement of findings, state its reasons with particularity, or provide a summary of the record as required by *N.J.A.C.* 4A:7.3.2, and as such, the determinations are flawed.

The appellant asserts that the 15-day suspension was issued against him for discriminatory reasons. In this regard, he contends that the EED decision indicates that he was involved in the alleged infraction despite there was no finding of

discrimination and that he is in possession of an unemployment determination which indicates that he did not commit the alleged misconduct. Moreover, the appellant states that he has appealed the imposition of the 15-day suspension and that matter is still pending.

The appellant states that he did not receive a copy of A.R.'s April 5, 2019 letter until several months after it was issued, whereupon he immediately filed an EED complaint regarding the matter upon its receipt. The appellant states that A.R.'s concerns expressed in the letter of his manic symptoms and excessive talking are "hurtful." In this regard, he maintains that his actions are in the normal range of behavior and explains that he has several disabilities, including a mental health disability, and that he is not a danger to others. The appellant takes issue with EED's finding that "you acknowledge that you can be irrational and unpredictable which gave credence to A.R.'s belief."[1] Moreover, he states that he should not be treated unfairly based on misperceptions and stereotypes. The appellant also claims that he has observed various individuals standing near A.R. on certain occasions and she did not object to their behavior.

Regarding his allegation that A.R. does not review L.H.'s work in the same way that she reviews his work, the appellant presents that the EED determination only indicated that the allegation was uncorroborated. The appellant argues that since the EED did not confirm that A.R. supervises L.H. differently than him, it demonstrates that he was singled out. The appellant adds that A.R. does not hold L.H. accountable for her work, and L.H. does not monitor the Social Workers in her unit. In this regard, the appellant claims that L.H. does not monitor due dates for assignments; does not follow policies with respect to birth certificate requests; and does not follow up with late assignments. In contrast, the appellant states he is held accountable if he does not properly complete his assignments.

The appellant acknowledges that work was reassigned to him when his supervisor was out on leave. However, the appellant states that, prior to submitting the initial EED complaint, he was assigned a greater amount of work than L.H., and he considered such work as "less desirable" assignments. The appellant explains that such less desirable work was no longer assigned to him at the time he submitted the EED complaint. He argues that this information shows that he was discriminated against, as his assignments were not equivalent to L.H.'s until he submitted the EED

[1] With respect to his behavioral issues, the appellant admits in this matter that he frequently behaves in an irrational and unreasonable manner, and that he has unrealistic expectations. The appellant explains that he expects everyone to act appropriately and he is shocked when their behavior does not meet his expectations. The appellant indicates that his exact statement was, "I can be irrational or unpredictable, but who isn't, and it doesn't mean I'm dangerous [or that] anyone has to be afraid of me." The appellant submits that unpredictable and irrational behavior with no accompanying violent behavior does not support the mistaken perception that individuals should consider themselves in an unsafe environment when confronted with such behavior. The appellant argues that the EED and his supervisor are perpetuating the idea that mental health disorders are dangerous in the workplace.

complaint. Moreover, the appellant asserts that he should not have been held accountable to make up and complete work when he was out on leave. The appellant adds that he should not have been required to submit work when he was at various trainings, and the trainings should be considered an accommodation. In support, the appellant provides voluminous documentation with respect to his and other employees' assignments, including L.H.'s assignments.

With respect to the denial of his leave request, the appellant contends that, although L.H. was approved to work from home in March 2020 due to the COVID-19 pandemic, he was not afforded the same opportunity to work from home in September 2020.[2] The appellant states that the EED's determination with respect to his leave concerns is devoid of information and not stated with any particularity. The appellant states that the only reason that was provided was that his leave request was denied for legitimate business reasons. The appellant asserts that the appointing authority did not indicate what constituted the legitimate business reason.[3] The appellant states that the appointing authority's authorization of other employees to work from home except for him is not a legitimate business reason and constitutes discrimination. Moreover, the appellant argues that there is no evidence that the appointing authority followed protocol with respect to his leave requests at the time of the COVID-19 pandemic. The appellant explains that the appointing authority informed him that he could not work from home while approved for leave under the federal Emergency Paid Sick Leave Act (EPSLA). The appellant states that he provided information from the federal government to the appointing authority, which contradicts its claims.[4] The appellant states that in September 2020, he requested the same leave that L.H. was authorized to use, and his request was denied.

In response, the EED maintains that there was no violation of the State Policy, and it relies on the information provided in its underlying EED determinations.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that under the State Policy, discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender, 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

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[2] The appellant states that review should be conducted via the Law Against Discrimination (LAD), federal Equal Employment Opportunity Commission (EEOC) or through the courts.

[3] The appellant argues that the reason why a legitimate business reason was not provided is because such a reason does not exist. The appellant adds that L.H. stated there was no leave program in March 2020.

[4] The appellant states that the EPSLA policy provides that employees may take leave in any increment and employers and employees are encouraged collaborate to achieve flexibility and meet mutual needs.

the Armed Forces of the United States, or disability. Additionally, *N.J.A.C.* 4A:7-3.1(b) states that it is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background or any other protected category set forth in (a) above. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

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 the State Policy. Examples of such retaliatory actions include, but are not limited to, termination of an employee; failing to promote an employee; altering an employee's work assignment for reasons other than legitimate business reasons; imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees). *See N.J.A.C.* 4A:7-3.1(h).

Initially, *N.J.A.C.* 4A:7-3.1(g)4 in conjunction with and *N.J.A.C.* 4A:7-3.2(g) state, in pertinent part, that [w]ritten records, consisting of the investigative report and any attachments, including witness statements, shall be maintained as confidential records to the extent practicable and appropriate and will remain so indefinitely. While the appellant contends that he cannot present a proper appeal without receiving redacted copies of these confidential records, it cannot be ignored that when requesting that the EED investigate a suspected violation, the complainant shall have the burden to articulate a sufficient nexus between the alleged conduct to a protected category pursuant to the State Policy. *See N.J.A.C.* 4A:7-3.2(a). As will be demonstrated below, the voluminous submissions by the appellant, including copies of the interview statements he provided during the course of these investigations, clearly show that the appellant did not articulate a sufficient nexus between the asserted acts to a protected category under the State Policy. Indeed, a review of all of the appellant's interview statements and documentation he provides in his appeal indicate that he merely makes allegations, but he is unable to provide the EED investigator with a scintilla of evidence or facts on which it could possibly be determined that there was a nexus between the asserted conduct and a violation of the State Policy. Therefore, there is absolutely no basis on which the Commission should order the production of confidential investigatory documents when the appellant's allegations do not provide a reasonable argument or an iota of evidence to call into question the thoroughness and impartiality of the EED's investigations in these matters.

COMPLAINT AGAINST A.R.

S.B. asserted that A.R. does not monitor L.H. in the same manner that she monitors him. In support of this contention, S.B. points to a number of his personal observations regarding the sufficiency of how L.H. performs her assignments, claiming her assignments are routinely past the due date. Conversely, he states that A.R. needs to be advised of a reason if her or his staff need an extension. When asked during the interview if he had any factual knowledge of A.R.'s "clear lack of ability to supervise [L.H.] and hold her accountable the same way she attempts to hold [him] accountable," S.B. simply states that he "would assume or hope the things that I am monitoring would improve." The only factual knowledge he proffered that L.H. was not being held accountable for various claimed work policy violations is that "they keep happening." However, the appellant even admitted during his interview with the EED investigator that when he advised A.R. of L.H.'s purported flaws, she responded "I'll look into it" and that three of them would work together as a team to resolve matters. Other than his personal assessment of her work, S.B. has not provided any evidence that L.H.'s work is continuously flawed, that L.H. is not required to get approval from A.R. if she or her staff need an extension, or that A.R. has not privately addressed an alleged work performance issue with L.H. Clearly, these asserted actions do not evidence that A.B. is "singling out" or "micromanaging" S.B.

By letter dated April 5, 2019, A.R. reported to her superior, L.C., that she felt unsafe both in and out of work based on her personal interactions , observations and conversations that she believed the appellant to be irrational, unreasonable, and that she was concerned for herself as well as the staff. This letter was sent to L.C. the day after S.B. sent A.R. an email regarding a weekly supervisor meeting. According to his e-mail, S.B. took issue with a claimed statement by A.R. that she could file disciplinary charges for things he recently did and that if he was unsatisfied with her as a supervisor, that he could seek employment elsewhere. S.B. then extensively describes the nature of his disabilities and how his manic symptoms, like talking excessively for no reason, forgetting things, loss of or extreme focus should not be misconstrued for him not to care about his work. S.B. then claims that A.R. made comments regarding his disabilities and he asks her to refrain from doing so in the future as he feels stigmatized for his disability. The appellant apparently posits that he is being scrutinized not based on his work performance but for his disability. However, assuming the letter was as a result of S.B.'s April 4, 2019 e-mail, it was merely the report of a supervisor to management concerning an employee under her charge that could possibly impact the safety of herself and the facility staff. Further, in a May 16, 2019 memo from L.C. to S.B., L.C. recounts a meeting she had with S.B. in which she noted that the appellant's April 4, 2019 email contained, among other things, false information. Moreover, there is no connection to A.R.'s letter and the fact that he received major discipline for conduct occurring in June 2019 on charges of emailing sensitive confidential information for no legitimate business reason.

S.B. also complained that the August 20, 2019 e-mail from A.R. to him about "invading her personal space and standing too close to her" was problematic because the email also stated that "other people have expressed similar complaints." The appellant explains that his problem with this is when he asked A.R. who the "other people" were, he did not receive a response. The fact that a superior does not share with subordinate personal concerns shared by other employees regarding a coworker is not indicative that A.R. is discriminating against him in any way. Further, as potential witnesses in support of this contention, he explained that he saw another social worker and a secretary "about two feet away from A.R." as he was "hanging out near the glass window into her office and was waiting to see if she said something to those employees." The Commission has serious concerns regarding S.B. "hanging out near the glass window" into his superior's office eavesdropping on her discussions or interactions with other employees. A.R.'s simple request to S.B. to be conscious of her personal space and that of others to promote a healthy workplace does not evidence that he is being discriminated against based on disability or retaliation. Therefore, the EED properly found that S.B. did not substantiate his allegations regarding A.R.'s asserted violations of the State Policy.

COMPLAINT AGAINST L.C.

S.B. asserted that in or around September 2020, L.C. denied his request to work from home to accommodate childcare/remote learning for his daughter, but that she previously permitted L.H. to work for several months from home for medical purposes. As correctly found by the EED, the investigation determined that L.H. was initially approved to work from home in March 2020 under a COVID-19 program that was no longer in place when S.B. requested to work from home in September 2020. In this regard, the Commission issued on March 11, 2020 temporary COVID-19 paid leave and work from home guidelines for State employees. The purpose of the temporary guidelines was twofold: to address State governmental staffing requirements necessary to ensure the continuation of essential operations, and to provide State employees with greater latitude in applicable leave time procedures to prevent further spread of the virus and to prioritize their health and the health of their immediate family members. However, in conjunction with the multi-stage reopening process as provided in Executive Order 149, the Commission rescinded the temporary guidelines for State employees effective July 4, 2020. State employees, both those that utilized temporary COVID-19 paid leave (which provided a greater leave benefit than what was provided for in the Federal Families First Coronavirus Response Act (Families First Act)), and those that did not, were then required to utilize either Emergency Paid Sick Leave (EPSL) or Extended Family Medical Leave (EFML) created by the federal Families First Act starting July 4, 2020. Thus, in September 2020, COVID-19 paid leave and the initial work from home guidelines did not exist and if needed, S.B. was required to utilize the more restrictive EPSL or EFML types of leave.

While the appellant claims that he should have been permitted to telework in September 2020, he conceded to the EED investigator that "basically we were going through a bunch of releases and we had a bunch of work so I guess that's more important than limiting interactions between inmates because it needed to get done." This is consistent with what L.C. advised the appellant in response to his request, *i.e.*, that work from home is reconsidered on a weekly basis and that it is solely upon the current needs of the department. Therefore, S.B. has not demonstrated that L.C. discriminated against him by not permitting him a type of leave in September 2020 that had been rescinded in July 2020.

COMPLAINT AGAINST A.R. AND L.C.

The appellant alleged that he was discriminated based on disability and retaliation by A.R. and L.C. The appellant claimed that he was retaliated by L.C. due to his filing a previous EED complaint when she denied his request to use five vacation days during the course of a15-day suspension he received for a non-EED matter. As A.R. was a witness in a prior EED investigation, S.B. maintains that she had a prior EED involvement with him and thus, was subjected to retaliated. Notwithstanding the appellant's assertion to the contrary, the EED found no evidence of an EED history with L.C. Additionally, regardless of the settlement offer he rejected, when asked by the EED investigator if he had any factual knowledge of other employees who were permitted to substitute vacation time for suspension days or to provide their names, S.B. responded "I cannot provide names because it's confidential." In other words, in a confidential EED investigation, S.B. refuses to provide the names of other potential witnesses that could be interviewed by the EED that could support his contentions. Indeed, to bolster his position, S.B. simply indicated, "I believe what my union guy told me. I have no reason to doubt what he says." Therefore, even if L.C. had a prior EED history with S.B., it could not have possibly corroborated his claims regarding employees who were permitted to substitute vacation time for suspension days. Further, the Commission will not comment on the sufficiency of the appellant's departmental hearing and the 15-day suspension that was imposed on him as that matter is unrelated to the appellant's specious claims in the instant matters. S.B. also did not persuasively demonstrate that A.R. assigned him birth certificate applications to review, which constituted additional work, in retaliation for prior involvement in an EED matter.

One final matter warrants comment. The appellant's assertions that the Commission should act like a court with respect to reviewing his claims is misplaced. The Commission is not a court of law, but rather, it has jurisdiction to review appeals based on the written record on a case-by-case basis pursuant to title 4A of the New Jersey Administrative Code and Title 11A of the New Jersey Statutes. As such, the appellant's discrimination appeal was addressed pursuant to Civil Service law and rules. The appeals process enables him to object to the EED's findings, and while he

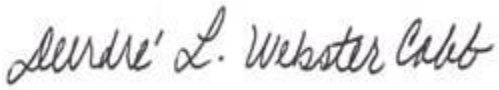
may not like the process or outcome, he had the opportunity to provide evidence in support of his claims to be evaluated in a neutral forum. As detailed through the course of this decision, the appellant failed to articulate a sufficient nexus between the asserted acts to a protected category under the State Policy and the evidence he provided does not even remotely suggest a violation of the State Policy. With respect to the appellant's request to have the instant matters reviewed in Superior Court, under the LAD, or before the EEOC, he is free to pursue any discrimination claims in those forums at his discretion.

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 23RD DAY OF MARCH, 2022



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