STATE OF NEW JERSEY

In the Matter of J.D., Department of Labor and Workforce Development	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2022-316	:	Discrimination Appeal

ISSUED: MARCH 25, 2022 (HS)

J.D., a Manager 1 Vocational Rehabilitation Services with the Department of Labor and Workforce Development, appeals the determination of the Assistant Commissioner, which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

V.K., a Supervising Vocational Rehabilitation Counselor, filed a complaint with the Office of Diversity and Compliance (ODC) against the appellant alleging discrimination based on disability. Specifically, V.K. alleged, among other things, the following:

- V.K. requested on multiple occasions to resume her supervisory duties when she returned to the office in March 2020 following her medical leave, but she did not receive any supervisory duties until October 2020, seven months after she returned from the leave.
- On October 19, 2020, the appellant asked V.K. for notice before she plans to go out on medical leave again.

The ODC conducted an investigation, during which it interviewed relevant parties and witnesses and reviewed relevant documentation submitted into the record.

In its determination, the appointing authority indicated that the appellant stated that he assigned V.K. special projects and other assignments due to his concern

of her potentially going out on leave again. The appointing authority found that although the appellant was concerned with the needs of the office and how the caseload may affect other staff, V.K. should have been afforded the opportunity to resume her original work duties once she returned from her leave. The appellant also admitted his actions were due to his own fear and did not indicate that his actions had been related to V.K.'s work performance. Concerning the appellant's request for advance notice of V.K.'s medical leave plans, the appellant stated that other supervisors are a "little put off by it" and that is why he asked her to give him a "heads-up" the next time before taking leave. The appointing authority determined that while the appellant noted that he had personal conversations with V.K. in the past regarding her disability, such interaction did not mean it was required that V.K. provide advance notice before taking such leave. The appointing authority added that changes in assignments should not be based on personal viewpoints or assumptions about a potential leave that may or may not occur. The appointing authority thus substantiated the allegations against the appellant and took corrective action.[1]

On appeal to the Civil Service Commission (Commission), the appellant maintains that he did not treat the appellant differently because of her disability. With respect to the issue of V.K.'s assignments, the appellant presents the following narrative. As things progressed, there was a need to interview and hire new counselors. The new staff hired needed to be trained virtually, which had never been done before. Staff had not yet been reassigned and V.K. has strength in researching policy and office procedure, so they tapped into her strengths. The office needed a framework to virtually train new counselors, and V.K. was asked to develop a training tool for the office. When the training tool was complete and things started to settle in with the new normal in the office, discussion began around reassigning the counselors to different supervisors. With respect to the allegation that the appellant asked V.K. for notice before she plans to go out on medical leave again, the appellant maintains that his remark was taken out of context and presents the following narrative. The appellant and V.K. were having a casual conversation about her being out for protracted periods of time, a conversation that was initiated by V.K., and the appellant suggested that if her doctor lets her know that she needs to be out of work for an extended period of time, it would be helpful if she could give the appellant a heads up. The appellant opines that it is the professional thing to do, given the integral position that V.K. holds. The appellant argues that as a manager, he depends on V.K.; the counselors who report to her depend on her; and their consumers who are waiting for services depend on her. According to the appellant, if V.K. does not have any idea about how long she will be out of the office, that is fine and, in his opinion, V.K. knows that. The appellant states that "the ugly truth of the matter is

[1] The corrective action is referenced as both counseling and training in the record. Neither counseling nor training is considered discipline. *See N.J.A.C.* 4A:2-2.1, *et seq*., and *N.J.A.C.* 4A:2-3.1, *et seq*. The record also reflects that the counseling or training given concluded the corrective action taken by the appointing authority in this case.

that [V.K.] has needed to take long periods of time off for a good part of her career. In an effort to try and work around this, I got accused of discriminatory behavior."

In response, the ODC states that during its investigation, the appellant stated that V.K.'s supervisory duties had not been reinstated due to his fear that she may take another medical leave for an extended period of time and her job duties would again have to be reassigned to other supervisors. The appellant, in his statement, indicated that "the other supervisors get a little put off by it so all I asked is that I get a heads-up next time because she just left." The ODC maintains that approved medical leave should not affect V.K.'s work assignments once she returned to the office, unless there was a legitimate business reason to change such assignments. Changes in assignments, according to the ODC, should not be based on personal viewpoints or assumptions about a potential leave that may or may not occur. The ODC also maintains that a supervisor is able to supervise and complete special projects at the same time. In addition, the ODC argues that although the mere discussion of V.K.'s disability and general conversation was not something that would fall under the State Policy, once the appellant asked, even if not in a serious manner, for notice related to V.K.'s medical leave, that could have been perceived as an act of discrimination. The ODC contends that the appellant's reasoning in his appeal is not the same as the statement he provided to the ODC and that he has shifted his narrative to include a reason to justify and reduce the impact of his actions.

In reply, the appellant, now represented by Alfred C. Laubsch, Jr., Business Manager, IBEW Local Union 30, states that because the process to return clients to work is paramount, the decision to not issue cases to V.K. was not made lightly. According to the appellant:

> Given the track record of [V.K.] and how managers in the Department of Labor [and Workforce Development] are trained that prior performance is a predictor of future results, [the appellant] operated within his statutory authority in not assigning cases to [V.K.]. Why? Simply stated, the damage done and cost that would be incurred should she go on medical leave is a factor that cannot be ignored and should not be glossed past as the appointing authority has sought to do here.
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> By assigning her to the task of preparing an operations manual, she was in the position of fulfilling a critical need for the office as a certainly more favorable choice than to disrupt the clients who could have been assigned to her in the event she went out on leave like she did with no notice or advanced warning in the 4th Quarter of 2019.

In addition, the appellant argues that the investigation took too long to complete as the ODC received the complaint on October 20, 2020, but the final letter of

determination was not issued until July 27, 2021. The appellant requests a hearing in this matter.

In reply, the ODC states, with respect to the timeframe of the investigation, due to the COVID-19 pandemic, a delay had been caused in investigations under the State Policy for all State departments. In April 2020, due to the pandemic, this agency's Division of Equal Employment Opportunity/Affirmative Action issued a directive that critical elements of investigations under the State Policy, such as witness and respondent interviews, would require additional time beyond the 120-day timeline for completion, thereby impacting the ability to complete investigations within certain timeframes due to prior cases that were on hold needing to be investigated in the order that all complaints were received. With respect to the merits, the ODC highlights that V.K.'s title is Supervising Vocational Rehabilitation Counselor and with that title comes the core function of supervising counselors. The ODC also argues that the appellant's reply did not address how his motive implicated the State Policy. Further, the ODC states that during the investigation, the appellant had failed to identify how any specific concerns with V.K., her work performance, or her absence had affected the office.

CONCLUSION

Initially, discrimination appeals are generally treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

Initially, it is noted that the appellant complains that the appointing authority's determination was untimely. He notes that V.K. filed her complaint on October 20, 2020, but the determination was not issued until July 27, 2021. *N.J.A.C.* 4A:7-3.2(l)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C.* 4A:7-3.2(l)3 states that the time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of Equal Employment Opportunity/Affirmative Action and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension. Further, it is noted that in accordance with Paragraph 6 of Executive Order 103 issued in response to the COVID-19 pandemic, the Commission approved various emergency adoptions of temporary rule relaxations

and modifications to *N.J.A.C.* 4A with respect to timeframes. In particular, effective April 9, 2020, *N.J.A.C.* 4A:7-3.2(l)3 was modified to state:

> The time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days**, which may be extended for good cause,** in cases involving exceptional circumstances. The State agency head shall provide the Division of [Equal Employment Opportunity/Affirmative Action] and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

The modification thus allowed the time for completion of the investigation and issuance of the final letter of determination to be extended even beyond 180 days. However, the modification did not affect the requirement that written notice of any extension, including an explanation of the exceptional circumstances supporting the extension, be provided to the Division of Equal Employment Opportunity/Affirmative Action and all parties. There is no evidence that such notice was provided in this case. As such, the ODC is reminded that it must comply with the regulatory directives in the future. Nonetheless, as further explained below, the Commission finds that a thorough investigation was conducted in the present matter, which substantiated the appellant's violation of the State Policy.

Turning to that issue, 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). 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. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. *See N.J.A.C.* 4A:7-3.1(b). 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 this matter and finds that an adequate investigation was conducted and that the investigation established that the appellant violated the State Policy. The available documents were appropriately analyzed and individuals were interviewed in investigating V.K.'s allegations prior to concluding that the appellant violated the State Policy on the

basis of disability. In this regard, V.K. reported that she requested on multiple occasions to resume her supervisory duties when she returned to the office in March 2020 following her medical leave, but she did not receive any supervisory duties until October 2020, seven months after she returned from the leave. V.K. also reported that on October 19, 2020, the appellant asked her for notice before she plans to go out on medical leave again. The investigation revealed that the appellant's decision to withhold supervisory duties from V.K. was not related to her work performance but was related to his fear that she may take another medical leave for an extended period of time. The appellant does not actually dispute this on appeal as he frankly states that he attempted to work around "*the ugly truth*" that V.K. has required long periods of time off for a good part of her career and that "the damage done and cost that would be incurred *should she go on medical leave* is a factor that cannot be ignored" (emphases added). It should be noted that the definition section of the job specification for V.K.'s title, Supervising Vocational Rehabilitation Counselor, states:

> Under direction of a supervisory official in a State department, institution, or agency, *supervises* the performance of professional and support *staff* engaged in providing counseling and rehabilitation services for the vocational rehabilitation of clients with disabilities requiring rehabilitative services over an extensive period of time; provides *supervision* to *staff* in assisting clients and employers in obtaining suitable employment or employees; does other related duties (emphases added).

Thus, when the appellant prevented V.K. from resuming staff supervision duties—duties that happen quite literally to constitute the very definition of her job title—over his fear that V.K. *might* again go out on medical leave, after V.K. had made more than one request to do so, the appellant treated V.K. less favorably based on her disability. Moreover, there is no evidence in the record that V.K. ever took a medical leave of absence that was not duly approved. The appellant's request for notice of V.K.'s medical leave plans cannot be isolated from the appellant's withholding of staff supervision duties. That request came on October 19, 2020, when the appellant returned staff supervision duties to V.K. after he had just *improperly* withheld them for seven months. The request, considering its timing, indeed could have created the impression of less favorable treatment based on disability. The appellant's statement during the investigation concerning his request for notice also bears noting. In that regard, the appellant stated that "the other supervisors get a little put off by it so all I asked is that I get a heads-up next time because she just left." The statement links the request for notice with the other supervisors' being "*put off*" (emphasis added), suggesting an improper motive for the request. Moreover, the appellant, on appeal, does not substantively refute having made the statement. Thus, the appellant's request for notice, under the particular circumstances presented here, was also a State Policy violation based on disability. Accordingly, the investigation was

thorough and impartial, and there is no basis to disturb the appointing authority's determination.

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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MARCH, 2022

Deirdré L. Webster Cobb

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Chairperson
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