STATE OF NEW JERSEY

In the Matter of P.S., Department of Corrections	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2022-607	:	Discrimination Appeal

ISSUED: MARCH 25, 2022 (HS)

P.S., a Senior Correctional Police Officer[1] with the Department of Corrections, represented by Frank M. Crivelli, Esq., appeals the determination of the Acting Commissioner, which found that the appellant failed to present sufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, an African-American female, filed a complaint with the Equal Employment Division (EED) based on color, disability, sex/gender, failure to report, and retaliation against T.H., Correctional Police Major, a Caucasian male; R.M., Correctional Police Lieutenant, a Caucasian male; J.F., Correctional Police Major, a Hispanic male; and N.S., Correctional Police Lieutenant, an Asian male. Specifically, the appellant alleged that R.M., who was the management representative in the appellant's disciplinary hearing, made the closing statement, "[w]e are only here because of someone's incompetence, inexperience, ignorance or laziness or combination thereof. This someone is [Senior Correctional Police Officer P.S.]," and that this statement violated the State Policy.[2] She further alleged that J.F. and N.S.

[1] The appellant is covered by the Policemen's Benevolent Association 105 for purposes of collective negotiations.

[2] It is noted that the appellant's disciplinary matter involved her being charged with chronic or excessive absenteeism or lateness and failure to follow call-off procedures. Specifically, it had been alleged that the appellant did not report to work at 6:00 a.m. as scheduled on the date in question. The appellant was contacted at 6:20 a.m., at which time the appellant advised that she was on her

witnessed the event and failed to report it, and that T.H. knew or should have known about the contents of the closing statement and did nothing about it. In response, the EED opened an investigation, which included witness interviews and the collection and review of pertinent documents. The respondents were interviewed and denied violating the State Policy. The EED investigation did not reveal any evidence to substantiate the appellant's claim that she was subjected to discrimination/harassment based on membership in a protected category or retaliation. Rather, the investigation revealed no evidence that the descriptors "incompetent," "inexperienced," "ignorant," or "lazy" were in relation to the appellant's (or anyone's) membership in a protected category. The appointing authority noted that "laziness" can be seen as a negative racist statement, particularly towards persons of color. However, in the context of R.M.'s statement and based upon the investigation, the use of the word "laziness" did not rise to the level of violating the State Policy. Accordingly, the appointing authority determined that there was nothing to report by J.F., N.S., and T.H. Furthermore, although there was an EED history between the appellant and R.M. and J.F., there was no connection between her prior participation and the alleged adverse actions in this matter, nor were the current allegations corroborated by the evidence. As such, the appointing authority did not substantiate a violation of the State Policy by the respondents.

In her appeal to the Civil Service Commission (Commission), postmarked September 16, 2021, the appellant insists that the R.M.'s use of the term "laziness" during R.M.'s closing statement in her disciplinary hearing was discriminatory and racist. She notes that the use of the word "laziness" is viewed and recognized as a derogatory racial stereotype often used towards American citizens of African descent. For remedies, the appellant asks that the appointing authority's determination be reversed; that the case be remanded to the appointing authority for further investigation; and that her three working day suspension be set aside.

It is noted that the appointing authority was provided with the opportunity to submit a response, but it did not do so.

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,

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way in to work. However, five minutes later, the appellant called out sick though policy required staff to provide notice of any absence due to illness at least one hour before the staff member's scheduled start time. The appellant's charges were upheld, and she received the minor disciplinary penalty of a three working day suspension, *see N.J.A.C.* 4A:2-3.1(a), in February 2020.

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 failed to establish that the appellant was discriminated against in violation of the State Policy. The EED appropriately analyzed the available documents and witness interviews in investigating the appellant's complaint and concluded that there was no violation of the State Policy. While the appellant may assert that R.M.'s use of the word "laziness" in his closing statement in the appellant's disciplinary hearing was discriminatory and racist, she presents no evidence of any connection between the use of the word and a protected category. In this regard, it bears emphasizing that it is a violation of the State Policy to treat an individual less favorably *based upon* any of the protected categories or to use a derogatory or demeaning reference *regarding* one's membership in a protected category. *See, e.g., In the Matter of V.A.* (CSC, decided July 18, 2018) (preponderance of evidence present to support finding that respondent made derogatory race-based comments by stereotyping black individuals as being lazy). By contrast, there is no evidence that R.M. used the word "laziness" to demean *African-Americans*. Moreover, it should not be ignored that the appellant had been charged with chronic or excessive absenteeism or lateness and failure to follow call-off procedures. That the word "laziness" might be used in connection with such charges is not unreasonable in this case. Thus, nothing in the record calls into question the EED's determination that R.M.'s *particular* use of the word "laziness" bore no relation to a protected category. Accordingly, the investigation was thorough and impartial; no substantive basis to disturb the appointing authority's determination has been presented; and, as such, a remand to the appointing authority is unnecessary.

The Commission adds the following comments. Given that the Commission is not disturbing the appointing authority's determination, it is not strictly necessary to consider the appellant's requested remedy that her three working day suspension be set aside. But even assuming the Commission were to consider it, there would be no basis to grant such relief. In this regard, the State Policy provides that employees filing appeals which raise issues for which there is another specific appeal procedure must utilize those procedures. *N.J.A.C.* 4A:7-3.2(m)1. Minor discipline procedures, in turn, are set forth in *N.J.A.C.* 4A:2-3.1 to -3.7, but those procedures shall not be

utilized to review a matter exclusively covered by a negotiated labor agreement. Further, *N.J.A.C.* 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission under a negotiated labor agreement or within 20 days of the conclusion of departmental proceedings under *N.J.A.C.* 4A:2-3.1 to -3.7, provided any further appeal rights to mechanisms under the agreement are waived. There is insufficient information in the record to demonstrate that the appellant has validly waived her appeal rights under her collective negotiations agreement. But even assuming she has, any appeal of her minor discipline is clearly untimely as the discipline was issued in February 2020, yet the instant appeal was not filed until September 2021.

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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