



STATE OF NEW JERSEY

In the Matter of M.G.,
Department of Health

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2020-2540

Discrimination Appeal

ISSUED JULY 25, 2022 (JET)

M.G. appeals the determination of the Director, Office of Diversity and Equity Services (ODES), Department of Health, which found that the appellant failed to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On August 19, 2019, M.G., an 85-year-old native born Iranian Muslim male, filed a complaint with the ODES, alleging that he was subjected to discrimination on the basis of his age, national origin, and religion. Specifically, M.G. alleged that his Temporary Employment Services (TES) position was discontinued due to his age, race, and national origin.¹ Initially, the appellant alleged that he contacted E.A., Clinical Director, Medical at the appointing authority, and informed him that he was interested in applying for a part-time position as a Psychiatrist. The appellant alleged that E.A. scheduled him for evaluations and routine testing by the psychiatric team, and he was subsequently appointed as a part-time TES Psychiatrist in December 2018. The appellant explains that, although he completed 14 assignment sessions in December 2018, he was only paid for 10 of such sessions as a result of an error that occurred by the Human Resources office.² In this regard, the appellant alleged that the Human Resources office erroneously informed him

¹ It is noted that the appellant previously served as a Clinical Psychiatrist from January 2002 until his retirement in June 2017, and his final salary was \$191,899.84. The appellant’s TES position was discontinued in January 2019.

² The appellant alleged that a Human Resources employee did not prepare a time sheet for him, and the Human Resources office did not accept a hand-written time sheet that he had prepared. As such, he is concerned that he will not be paid for those hours.

that he could not earn more than \$15,000 per year while employed as a TES employee due to his pension from his prior State employment, and as such, it stated he would not be able to continue to work in 2019. The appellant indicated that he inquired about the matter with the Division of Pensions (Pensions), and it subsequently informed him that there was no limitation on his salary earnings in a given year. However, Pensions informed him that he was only entitled to work two days a week in 2019. The appellant stated that the appointing authority later informed him that the information with respect to the \$15,000 a year salary limit was erroneous, but nevertheless it discontinued his TES position on that basis. The appellant added that E.A. stated that the appellant's TES position was discontinued because there was no more part-time work for the appellant, as full-time Psychiatrists had been hired. The appellant alleged that he is in good health, remains active, and maintains sufficient mental capacity, and he requested to continue working on a part-time basis. The appellant stated that he was born in Iran and is not currently a practicing Muslim, and he alleged it is possible that an anti-Muslim attitude in the workplace caused him to experience the aforementioned issues in the workplace. Moreover, the appellant stated that E.A. told him to reapply for a TES position in 2020.

The ODES conducted an investigation and did not substantiate a violation of the State Policy. Specifically, the ODES found that the Human Resources office made an administrative error at the time it informed the appellant that he could not earn more than \$15,000 per year. In this regard, the ODES found that the appellant's earnings as a TES employee did not have such a restriction based on his pension. However, the ODES explains that, given the appellant's prior service in his prior permanent title as a Clinical Psychiatrist, E.A. wanted to be certain that no Civil Service rules were violated with respect to the appellant's employment as a TES employee. As such, Human Resources advised the appellant about such information out of caution. The ODES determined that the administrative error did not constitute a violation of the State Policy, and E.A. denied that the appellant was informed of such information based on his age, national origin, and race. Regarding the appellant's allegations that he was only paid for 10 out of 14 sessions, the ODES determined that such allegations did not implicate the State Policy, but rather, was an issue he should more appropriately address with the payroll unit. The ODES indicated that four full-time Psychiatrists were recently appointed at the appointing authority. In this regard, the ODES found that the four recently appointed Psychiatrists were Muslim, that one Psychiatrist's national origin was India/South Asia, and another Psychiatrist's national origin was Pakistan/Western Asia-Greater Middle East. Additionally, the ODES found that since the appellant was previously employed at the appointing authority for 17 years, and since he obtained the TES appointment, it concluded he was not subjected to a violation of the State Policy. As such, the ODES determined that there was no information to show that the appellant's TES appointment was discontinued on the basis of his age, national origin or religion.

On appeal, the appellant reiterates many of the same arguments in his initial complaint. In addition, the appellant asserts that the ODES did not conduct a proper investigation. Specifically, the appellant contends that he received conflicting information, as he spoke to the CEO and he was informed at that time to reapply for the TES position in September 2019. However, the appellant states that E.A. informed him that the position was not available. As such, the appellant claims that the appointing authority is making excuses with respect to the TES position. The appellant adds that the ODES did not address his concerns regarding age discrimination. Moreover, the appellant states that he should be able to work as a part-time TES employee despite his age, as he is still able and willing to work.

In reply, the ODES maintains there was no violation of the State Policy. Specifically, the ODES reiterates that it did not investigate the salary issues as that matter did not implicate the State Policy. The ODES confirms that the appellant TES position was discontinued at the time his earnings from the TES position amounted to \$15,000. The ODES reiterates that the Human Resources office made an administrative error when it advised the appellant that he could not earn more than \$15,000 in a given year, however, it maintains that such an administrative error does not constitute a violation of the State Policy. However, the ODES explains that the appellant was informed by J.F., Acting Director, that the TES position was no longer available as there was a sufficient amount of full-time Psychiatrists at the appointing authority, and, as such, no part-time work was available. The ODES states that it interviewed J.F. and he denied that the appellant was removed based on his age, national origin, and religion, but rather, J.F. indicated that a business need existed for hiring four full-time psychiatrists in 2019. The ODES reiterates that those Psychiatrists were interviewed and it was revealed that each of them are Muslim. The ODES asserts that the appointing authority's explanation that it could not reappoint the appellant to the TES position was not an excuse, as no part-time positions were available and full-time Psychiatrists had been appointed. In addition, the ODES explains that the appellant was appointed to the TES position for which he applied, and as such, he could not have been discriminated against as he obtained the position. Rather, the reason for the removal was that E.A. did not want to violate any Civil Service rules with respect to the appellant working as a TES Psychiatrist, as he was previously employed as a Clinical Psychiatrist in the same facility. Moreover, the ODES reiterates that E.A. denied that the appellant's removal was based on age, national origin, and religion.

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 (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. The appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)(4)*.

N.J.A.C. 4A:7-3.1(a) provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, State colleges or Universities, agencies, and authorities. *N.J.A.C. 4A:7-3.2(a)* provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees, including those employees not covered by Title 11A may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. Specifically, *N.J.A.C. 4A:7-3.2(m)* states that a complainant who is in the *career, unclassified or senior executive service*, or who is an applicant for employment, who disagrees with the determination of the State agency head or designee, may submit an appeal to the Commission. However, TES service is not one of the specific classes of employees to which appeal rights to the Commission are provided in *N.J.A.C. 4A:7-3.2(m)*. In this regard, TES positions have no underlying Civil Service status, are “at-will” employees and are “*per diem*,” which means those employees only serve “by the day.” Appointing authorities utilize TES employees to complete special projects, respond to workload fluctuations, and fill in when employees are on leave. A key feature of TES service is the ability of an individual to decline an offer of work for a particular day or time with no adverse repercussion, such as potential disciplinary action, as could be the case if a career, unclassified, or senior executive service employee did not report for work when scheduled. Moreover, even if a TES employee has a regular, part-time schedule, it does not convert their employment status, since either the TES employee, or the appointing authority, can change the schedule at any time or discontinue the TES service. In this case, as the appellant served as a TES employee, the Commission lacks jurisdiction to adjudicate his appeal. Therefore, the Commission dismisses this appeal solely on the basis of lack of jurisdiction.

While the Commission has dismissed this appeal due to lack of jurisdiction, the following is provided for informational purposes only. In this case, even assuming *arguendo* that the appellant served in one of the specific classes of employees entitled to file an appeal under *N.J.A.C. 4A:7-3.2(m)*, which he does not, the record does not establish that he was he was subjected to discrimination in violation of the State Policy. The record reflects that the ODES conducted a proper investigation. It interviewed the relevant parties in this matter and appropriately analyzed the available documents in investigating the appellant’s complaint. The appellant did not provide any witnesses or substantive evidence to show that he

was subjected to discrimination on the basis of his age, national origin, or religion. Additionally, E.A. and J.F. denied the allegations. As such, the appellant has not provided any information in this matter to refute the underlying ODES determination, and therefore, the underlying determination was correct when it determined that there was no violation of the State Policy.

Additionally, the discontinuation of the appellant's TES position does not, in and of itself, show that there was a violation of the State Policy. As noted earlier, the appellant does not possess a vested property interest in the TES position. TES positions are temporary positions utilized for the legitimate business purposes of the agency, however, such positions do not have any underlying Civil Service status. Rather, employees who are employed in TES positions are essentially "at-will" employees. As such, the appellant's TES appointment could be discontinued at any time, and the appointing authority did so in the appellant's case. Moreover, the record reflects that the appointing authority was unable to reappoint the appellant to a TES position, as it had appointed four full-time Psychiatrists and there was no need for any part-time TES employees. Appointing four full-time Psychiatrists was appropriate, as filling such vacancies met the legitimate business needs of the agency. With respect to the appellant's argument that the appointing authority erroneously informed him that he could not earn more than \$15,000 while employed in his TES position, the appointing authority admittedly made an administrative error when it informed the appellant of such information. However, an administrative error, in and of itself, does not substantiate a violation of the State Policy. With respect to E.A.'s rationale that he did not want to violate any Civil Service rules regarding the appellant's TES appointment, the Commission instructs the ODES to inform the appointing authority that it must contact this agency when future questions arise pertaining to prior employees who are hired as TES employees. Nonetheless, such information does not substantiate a violation of the State Policy, since as noted above, it was within the appointing authority's discretion to discontinue the appellant's TES appointment and not rehire him based on the legitimate business needs of the agency.

With respect to the appellant's allegations pertaining to not being paid for some of the work he performed, he did not provide any evidence in support of that claim. Regardless, such information does not, in and of itself, invoke the State Policy. Moreover, the appellant is not prevented from applying for other TES positions for which he may have an interest. In this matter, the appellant has not provided a nexus between such allegations and any of the above noted protected categories of the State Policy to show that a violation occurred. Moreover, there is no evidence to show that the appellant was singled out or that he was subjected to retaliation as described above. Other than the appellant's allegations in this matter, he has failed to provide any evidence that he was discriminated or retaliated against in violation of the State Policy. Accordingly, he has not satisfied his burden of proof in this matter.

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 20TH DAY OF JULY 2022

Deirdre' L. Webster Cobb

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