



STATE OF NEW JERSEY

In the Matter of S.W., Department of
Community Affairs

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-79

Discrimination Appeal

ISSUED: September 21, 2022 (SLK)

S.W., a Program Specialist 3, Regulatory Programs (Program Specialist 3) with the Department of Community Affairs, appeals the decision of the Lieutenant Governor, which was unable to substantiate that she was subject to discrimination and retaliation in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, S.W., who is an African-American female, alleged that J.E.¹, a Caucasian female Manager 3, Human Resources, discriminated against her by way of race and/or sex/gender based on a promotion request for S.W. in the Division of Codes and Standards (Division). S.W. also raised an allegation of retaliation. The investigation did not substantiate the allegations. However, recommendations were made, and action was to be taken, with respect to training on the appointing authority’s policy and the State Policy.

On appeal, S.W. asserts that the appointing authority did not uniformly apply promotional standards when considering promotions for R.A., a Caucasian male Program Specialist 4, Regulatory Programs (Program Specialist 4). She believes that the appointing authority’s Equal Employment Opportunity (EEO) Officer did not consider statistical data about the disproportionate number of African-American women, not including elected or appointed staff, who are not assigned to the “S”

¹ Personnel records refer to J.E. as J.C.

bargaining unit, which is a bargaining unit for second-level supervisors. S.W. requests that she be promoted to Program Specialist 4 (S29 salary range), which is R.A.'s salary and a title that was held by her male predecessor. She also requests back pay from November 2019, starting at the S29 salary range, step 10, which is comparable to R.A.'s 2022 pay.

S.W. claims that J.E. admitted that R.A.'s promotion to Program Specialist 4 was approved based on deceptive practices, presumably perpetrated by E.S., a Caucasian male Division Director, Department of Community Affairs, and K.L., a Caucasian male Assistant Director, Codes, Standards and Housing Development. She contends that J.E. allowed the alleged deceptive practices to go unchecked for years and she continued to support these practices even when R.A.'s promotion was premised on lies and deceit. S.W. alleges that J.E. continued to retaliate against her by refusing to move forward on a promotion request from her Director that was submitted in February or March 2022 to promote her to Administrative Analyst 4. She presents that the recent promotional request was made approximately three years after a prior request was made to promote her to Program Specialist 4. S.W. asserts that the Division has failed for many years to promote African-American women to higher-level supervisory positions in proportion to other employees and this is also a systemic problem with the appointing authority. She highlights that at the time R.A. was promoted, and for two years following his promotion, he did not have the correct reporting relationships to support his promotion to Program Specialist 4.

S.W. believes that in 2019, J.P., a Caucasian female Chief of Staff², J.E., E.S., and K.L. discussed J.P.'s concerns regarding R.A.'s and her promotional requests. She contends that J.P. indicated that there were "insufficient reporting relationships" to support both their promotions to Programs Specialist 4. Thereafter, S.W. presents that the organization chart was revised to show that there were several supervisory staff reporting to R.A. to support his promotion to a second-level supervisory title, which led to his promotion being approved. She indicates that Human Resources submitted a Draft Organization Chart showing M.W., a Caucasian male, as a Construction Official³ "grandfathered" supervisor, T.P., a Caucasian male, as a "grandfathered" Construction Official⁴ supervisor, and J.T., a Caucasian male, as a Construction Official supervisor. She claims that M.W. and T.P. were most likely misclassified as they do not appear to supervise staff based on the proposed organization chart she attaches. Therefore, S.W. argues that M.W. and T.P. could not be used to justify R.A.'s promotion in 2019 because, since October 2015, the Civil Service Commission (Commission) has held in her previously denied classification appeal that second-level supervisors are required to supervise primary-level supervisors who supervise subordinate staff. Furthermore, she presents that more than two years after R.A.'s promotion, Human Resources allegedly "discovered" that

² Personnel records indicate that J.P. retired on December 31, 2019.

³ Personnel records indicate that M.W. retired on June 30, 2020.

⁴ Personnel records indicate that T.P. retired on June 30, 2022.

R.A. did not actually supervise J.T., who was presumably the only *bona fide* supervisor to support his promotion. Therefore, she contends that supervisory reporting relationships were manufactured to promote R.A. S.W. states that between 2019 and 2021, the appointing authority could have revised the organization chart and reassigned staff to justify her promotion just as they did for R.A. She presents that E.H., a Caucasian male Research Analyst 4⁵ who was a primary-level supervisor, could have been reassigned so that she supervised him before he retired. Therefore, S.W. argues that the appointing authority treated her differently and held her to a higher standard by not putting forth the same effort towards her promotion and by giving non-credible reasons to support R.A.'s promotion.

S.W. presents that based on an April 27, 2022 organization chart, which is two years after R.A.'s promotion, he now is properly supervising a primary-level supervisor. However, she claims that his initial promotion was invalid and based on lies as he was not supervising a primary-level supervisor at the time of his promotion. S.W. asserts that J.E. knows that organizational charts can be modified in any manner and she could have verified the reporting relationships by reviewing electronic Performance Assessment Reviews (ePARs), but she failed to do so. She questions why R.A.'s reporting relationships were not verified if this was a point of discussion and the basis for denying her promotion. S.W. states that the appointing authority recently issued a posting for a Program Specialist 3 position within R.A.'s unit to further support the justification for his promotion to a second-level supervisory title.

S.W. indicates that in February or March 2022, E.S. requested that she be promoted to Administrative Analyst 4, which is in the "R" bargaining unit and has a 29 salary range (R29), as she is already in the "R" bargaining unit. Therefore, she states that there are no supervisory reporting relationships for her to overcome to be appointed to that title. She presents that P.S., a Caucasian female, was promoted to Supervising Planned Real Estate Development Analyst in April, which is a R29 salary range, and she is not required to supervise other supervisors. Nonetheless, S.W. contends that J.E. refused to support her promotion because of her prior EEO complaint against her in November 2021. She claims that it is public knowledge that the appointing authority has been promoting incumbents and hiring new staff. For example, S.W. asserts that an Assistant Director, Codes, Standard and Housing Development position was recently created for S.Wo., a Caucasian female, so that she could maintain oversight over the Bureau of Housing after she was bumped from the Bureau Chief position. She believes that this is an example of bias and favoritism as one is generally not promoted when they are bumped and this shows that J.E. is biased and retaliating against her. S.W. argues that J.E. does not objectively apply Civil Service rules and she takes extraordinary efforts to promote some while taking punitive action against her as she continues to be treated less favorably than R.A. and male predecessors.

⁵ Personnel records indicate that E.H. retired on September 30, 2021.

S.W. contends that J.E.'s recent second time denying her a promotion, along with her promoting three African-American women directly under J.E.'s supervision only three months after her EEO complaint, reeks of retaliation. She believes that the recent promotions of the three African-American women was done to dispel the facts in her complaint. She believes that accurate statistical data from the appointing authority would show that, through the years, it has not promoted African-American women to higher-level supervisory positions. S.W. asserts that Human Resources Managers have engaged in biased and discriminatory behavior, even if unconsciously, which has negatively impacted her ability to advance. She states that she has been held to a higher standard than Caucasian male predecessors and contemporaries, specifically R.A., and other non-African-American females, in her Division, when it comes to promotions to higher-level supervisory titles. S.W. asserts that her Division guides African-American women to lower-level titles while guiding Caucasian males to higher-level titles. She presents that in 2014, she was promoted from Research Analyst 3 (R24) to Program Development Specialist 3 (R26), while the next higher-level title in the Research Analyst 3 title series was Research Analyst 4 (R28). However, her Caucasian male predecessor from her 2014 promotion was W.R.⁶, who had been promoted to Supervising, Community Service Officer (S29), which is three salary grades higher than her, even though his promotion was from a R26 salary range title. Additionally, she indicates that prior to W.R., there was S.D.⁷, a Caucasian male, who was a Supervisor of Enforcement (S30). She indicates that when she asked S.D., her then supervisor, why the title was downgraded, he said that Human Resources said that the "title goes with the person not the job." Although she thought that this response was illogical, she accepted the downgraded title because she believed there would be future advancement opportunities. S.W. complains that in 2019, she was assigned additional work and supervisory duties with the expectation that she would be promoted based on the draft succession plan reportedly submitted by K.S.⁸, a Caucasian female Administrative Analyst 4, and her other higher-level supervisor predecessors. However, Human Resources denied her promotion in 2019 or 2020. Subsequently, in February or March 2022, her Director recommended that she be promoted to Administrative Analyst 4 (R29), which J.E. denied even though she was already in the "R" bargaining unit and there were no supervisory reporting relationship challenges to overcome.

S.W. concludes that the Commission did not consider mitigating factors when it denied her classification appeal as it did not consider the discriminatory employment practices against her. She asserts that the Commission's decision in her classification appeal should not be used to justify the discrimination against her.

⁶ Personnel records indicate that W.R. was promoted from Community Service Officer (R26) to Supervising, Community Service Officer (M29) in February 1998. In December 2006, the salary range changed from M29 to S29. He retired on April 1, 2014.

⁷ S.D. could not be located in personnel records.

⁸ Personnel records indicate that K.S. retired on October 31, 2018.

S.W. reiterates that at the time she filed her classification appeal, African-American women working in her Division and throughout the appointing authority were not being promoted to higher-level supervisory position in proportion with others and statistical data can prove this. S.W. submits documentation which indicates that the Commission denied her request to her have position reclassified to Program Specialist 4 based on a “technicality.” She also states that the Commission found that her job duties were commensurate with Program Specialist 4 and her appeal was only denied because she was not currently supervising an employee in the “R” bargaining unit.

In response, the appointing authority presents that S.W. works in the Division of Codes and Standards, Bureau of Homeowner Protection Claims/Registration Unit, where E.S. is the Director and K.L. is the Assistant Director. It indicates that it interviewed E.S., K.L., S.W. and J.E. as part of its investigation. The investigation revealed that E.S. stated that the Division requested that S.W. be promoted, and the request was submitted to J.E. in February 2020. Additionally, E.S. provided that he, K.L., and S.W.’s supervisor supported her classification appeal in April 2021. Further, K.L. indicated that although the promotion request for S.W. was submitted in February 2020, personnel actions were put on hold due to the pandemic. It indicates that J.E. explained that she denied S.W.’s promotion to Program Specialist 4 because the Division’s supervisory structure did not support it since she was not supervising employees in the “R” bargaining unit. J.E. also noted that the Commission determined that S.W.’s position could not be classified as a Program Specialist 4 for the same reason and it determined that this title was not appropriate for her duties. Regarding R.A., the investigation revealed that J.E. advised that the Division’s organization chart showed that he supervised J.T. However, based on an American with Disabilities Act (ADA) accommodation request, R.A. indicated that he did not supervise him. Therefore, J.E. requested that the organization chart of the Division be revised to accurately reflect the reporting structure within the Division.

Accordingly, the appointing authority indicates that the allegations of discrimination could not be substantiated because the organization structure of the Division did not support S.W. being promoted to Program Specialist 4. It presents that the Commission’s decision also confirmed its conclusion. The appointing authority states that while the Division supported S.W.’s promotion and reclassification, the appointing authority could not support it because the organizational structure of the Division did not support it and its decision was not based on discrimination. It emphasizes that S.W.’s unit does not have a sufficient number of personnel to support her requested promotion and the Division’s inability to restructure itself to support S.W.’s promotion is not grounds to find that J.E. discriminated against her. The appointing authority provides that the Division and J.E. should have more frequent discussions and training on promotional justifications. It notes that R.A.’s promotion was approved based on the organizational chart that the Division submitted to J.E. Further, the organizational

chart for his unit was corrected once the concerns about it were identified. The appointing authority highlights that R.A. is in a different office in the Division than S.W. and his office had sufficient personnel to justify his promotion, which explains their differential treatment. It states that S.W.'s allegation regarding the promotion of three African-American in other divisions does not support her claims as there were correct justifications for those promotions. Moreover, the appointing authority indicates that S.W.'s claim that J.E. retaliated against her was not supported by facts as she is required to follow Civil Service law and rules.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, the State is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon race and/or sex/gender will not be tolerated.

N.J.A.C. 4A:7-3.1(h)2 provides that 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 this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation.

N.J.A.C. 4A:7-3.1(g)1 provides, in pertinent part, that the investigations shall be conducted in a prompt, thorough, and impartial manner.

N.J.A.C. 4A:7-3.2(m)4 provides that the appellant shall have the burden of proof in all discrimination appeals brought before the Commission.

Initially, it is noted that S.W. misinterprets this agency's determination denying her request to have her position reclassified to Program Specialist 4. She claims that her request was denied based on a "technicality" and that this agency confirmed that her duties were commensurate with her requested. However, there was no such finding. To the contrary, this agency denied her request because supervising employees in the "R" bargaining unit is required to be performing the duties commensurate with that title. This is not a "technicality," and merely being a primary-level supervisor is insufficient, as being a second-level supervisory is the distinguishing duty of employees in titles, such as Program Specialist 4, that are in the "S" bargaining unit. See *In the Matter of David Bobal, et al.* (CSC, decided November 23, 2016) and *In the Matter of Nanci Carr* (CSC, decided November 23, 2016). This agency's determination was confirmed by the Commission on appeal.

Consequently, J.E. did not discriminate or retaliate against S.W. when she did not support S.W.'s reclassification request as she was following Civil Service law and rules. Similarly, when J.E. denied the Division's request to promote her to Program Specialist 4, J.E.'s denial was based on Civil Service law and rules and not discrimination and/or retaliation, as the organization chart submitted by S.W.'s Division did not support the need for a second-level supervisor.

Regarding R.A., a Caucasian male, the record is unclear if the actual organization chart that was used to support his promotion to Program Specialist 4 indicated proper reporting relationships as S.W. only submitted proposed organization charts and not approved organization charts. Further, there may be more detail to the approved organization chart that has not been provided. Regardless, even if R.A. was misclassified, this does not support S.W.'s promotion or reclassification to a Program Specialist 4 position, as the remedy for misclassification of another position is not to perpetuate the misuse of the higher title by reclassifying S.W.'s position to that title, but rather, to review the position classifications of the positions encumbered by the named employees to ensure that they are properly classified. *See In the Matter of Stephen Berezny* (CSC, decided July 27, 2011). Also, when it was discovered that R.A. was not actually supervising one of the "R" level supervisors in that organization chart, J.E. had the organization chart updated. Additionally, S.W. indicates that R.A. presently is a second-level supervisor. Moreover, the possibility that R.A. initially improperly received a promotion is not evidence of discrimination or retaliation against her as the record indicates that there were not the proper reporting relationships to support her promotion or reclassification to Program Specialist 4. It is noted that R.A. is in a different unit than S.W. and there is nothing in the record that indicates that along with the Division's request to promote S.W. to Program Specialist 4, the Division submitted an organization chart that indicated that she would be a second-level supervisor if the request was granted. Therefore, contrary to S.W.'s belief, S.W. and R.A. were not similarly situated employees and there is no basis to conclude that she received differential treatment in violation of the State Policy.

Concerning the three African-American woman who S.W. indicates were promoted shortly after her EEO complaint against J.E., the record indicates that these promotions were direct reports to J.E. and, therefore, in a different unit than S.W. Therefore, these promotions are not evidence of retaliation against S.W. In reference to S.W.'s statements that her predecessors received promotions from R26 titles to S29 or S30 titles, these prior promotions are not evidence that the current organization chart supports her promotion to an S29 title under current Civil Service law or rules. To the contrary, it would appear that the main reason that her current or prior superiors supported her request to be promoted to a "S" title, is the main reason that Civil Service law and rules do not support it. In K.S.'s 2018 reorganization recommendations, she stated that for the past 10 to 15 years staff retired or left and supervisors were leaving at that time of the proposal. In other

words, if staff is shrinking, there are less opportunities and need for second-level supervisors. While S.W.'s duties and responsibilities may have increased due to staff shortages, unless there is a need for her to be a second-level supervisor, she cannot be promoted to an "S" level title under current Civil Service law and rules.

Additionally, S.W. has not presented one scintilla of evidence, such as a statement from a witness or other confirming evidence, that any of J.E.'s actions were based on S.W.'s membership in a protected class or retaliation. Further, despite S.W.'s claim that statistical data will demonstrate widespread discrimination against female African-American promotions to higher-level titles, she has not presented any statistical evidence to support such claims. Additionally, employees who were promoted in other divisions or units do not demonstrate that she was discriminated against, since these are not similarly situated employees. Moreover, the fact that her superiors supported her promotion or reclassification to an "S" level title does not support her claim as there is nothing in the record that indicates that these superiors considered Civil Service law and rule when requesting her promotion or supporting her reclassification. Mere speculation, without evidence, is insufficient to support a State Policy violation. *See In the Matter of T.J.* (CSC, decided December 7, 2016). Accordingly, the Commission finds that the investigation was thorough and impartial, and S.W. has failed to meet her burden of proof.

One other matter needs to be addressed. On appeal, S.W. states that in February or March 2022, E.S. requested that she be promoted to Administrative Analyst 4 (R29). She indicates that J.E. denied her request even though she is already in the "R" bargaining unit and there are no reporting issues.⁹ Therefore, she asserts that this is further evidence that J.E. discriminated and/or retaliated against her. However, there is nothing in the record that indicates that S.W. made this allegation in her EEO complaint, or if she did, that this allegation was investigated. Therefore, if S.W. believes that she was subject to discrimination and/or retaliation based on the alleged denial of a request to promote her to Administrative Analyst 4 (R29), she may file a new complaint.

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.

⁹ It is noted that the Commission is not implying that S.W. should automatically be promoted to a higher-level "R" title, or to an "S" title if the Division submits an organization chart to support it, as there still may be other legitimate business reasons not to support such a request.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF SEPTEMBER, 2022

Dolores Gorczyca

Dolores Gorczyca
Presiding Member
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: S.W.
Kimberly K. Holmes
Division of EEO/AA
Records Center