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STATE OF NEW JERSEY

In the Matter of J.K.,
Department of Human Services

CSC Docket No. 2015-3298

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Minor Discipline Appeal

ISSUED: OCT 09 2015 (SLK)

J.K.[1], an Employee Relations Coordinator (ERC) with the Division of Family Development, Department of Human Services, appeals his three-day suspension.

By way of background, a complaint was filed against the appellant on September 2, 2014 alleging that he violated the State Policy Prohibiting Discrimination in the Workplace (State Policy). Specifically, K.H., a Senior Management Assistant, on August 14, 2014 following an ERC meeting, had lunch with the appellant and R.A., an ERC, at a restaurant. K.H. alleged that in response to her question as to where he would work upon the closure of the Woodbridge Developmental Center (WDC), the appellant stated that he "would love to come to Hunterdon Developmental Center (HDC) to work, but would not get any work done because he would be chasing her around the office". The Office of Equal Employment Opportunity (EEO) investigated the matter and determined that the appellant violated the State Policy. Subsequently, the appellant was charged with violating an administrative order and conduct unbecoming a public employee, and after a departmental hearing, received a three day suspension.

On appeal, the appellant asserts that the lunch in question was an off-site social function between off-duty individuals where no State business was conducted. Therefore, the determination that his comments touched the State Policy is a violation of his right to free speech under the Constitution. Moreover, the appellant

[1] Initials are being used in this matter as it involves a complaint against the appellant alleging that he committed a violation of the State Policy.

claims that K.H. asked him several times during the luncheon if he was going to consider a position at HDC after the closure of WDC to which he responded "no" each time. However, in order to cut off the redundancy of her continuously asking the same question and infuse some humor to the situation, the appellant stated he finally responded, "K.H. I would never get any work done. I would be chasing you around the office." The appellant argues that this comment is not sexual harassment because he did not work with or supervise K.H. and he made it clear that he was not going to be accepting a position at HDC. Therefore, his actions could not have created a "hostile" work environment. In this regard, the appellant highlights that K.H. acknowledged that she felt that he was joking in her September 2, 2014 statement reporting the incident. Further, after he made the comments, the appellant claims that K.H. invited him to her home twice before leaving the restaurant. The appellant also argues that the complaint was filed 19 days after the incident because K.H. was instructed by her superiors to do so in order to retaliate against him for declining to take a position at HDC. In support of this argument, the appellant presents that K.H.'s initial statement was not framed as a complaint but was characterized as a sexual harassment complaint after a subsequent statement was taken by the EEO.

Additionally, the appellant asserts that the appointing authority did not follow its own disciplinary guidelines which provides for penalties ranging from counseling to a written warning for a first infraction for "generalized gender based remarks and behavior." Further, the appellant argues that the appointing authority deliberately used the wrong section from its guidelines and inappropriately charged him with conduct unbecoming a public employee in order to exceed penalty guidelines. The appellant maintains that the penalty imposed is arbitrary and capricious as other employees who have engaged in far more egregious violations of the State Policy have received far less discipline including no discipline at all. The appellant also claims that the appointing authority did not consider mitigating factors when determining the appropriate discipline, such as his 22 years of service without any prior disciplinary history.

Moreover, the appellant contends that a mistake made in the initial Notice of Suspension which places the date of the incident as September 2, 2014 instead of August 14, 2014 was a material error which resulted in him not having an opportunity to prepare a defense for a specific incident on a specific date. Further, he claims that the hearing officer was biased since he was paid by the appointing authority, was inexperienced, did not accurately report all the material aspects in the case, and inappropriately deferred answers to procedural questions to the appointing authority's representative. For example, he claims that direct testimony from an experienced ERC indicating that no State business was conducted during the lunch was not included in the hearing officer's report. In contrast, the EEO Officer testified that if no State business was being conducted or discussed, the State Policy would not apply. However, this testimony was not addressed in the

hearing officer's report, which resulted in the hearing officer incorrectly determining that he violated the State Policy. Additionally, the appellant maintains that it was inappropriate for the appointing authority to present in its closing statement that his comments had a "chilling effect" on K.H. without any supporting facts or evidence, especially since R.A. testified that K.H. told him that she would not have reported the incident without being instructed by management.

In response, the appointing authority asserts that the appellant does not present issues of general applicability in the interpretation of law, rule, or policy, evidence that its determination was motivated by invidious discrimination, nor is its discipline in conflict with Civil Service laws. Therefore, his three day suspension should not be disturbed as it was appropriate under the circumstances. Specifically, it provides that the appellant admitted to making the comments, the EEO investigation substantiated that the comments violated the State Policy, and the appellant was charged with conduct unbecoming a public employee since his comments were highly inappropriate in light of his training and responsibility as an ERC. Further, he potentially could have worked with K.H. by being bumped to HDC due to the closure of WDC.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

1. The [Commission] shall review the appeal upon a written record or such other proceeding as the [Commission] directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the [Commission's] decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the [Commission] will render a final administrative decision upon a written record or such other proceeding as the [Commission] directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level. In the present matter, while this appeal provides an issue of general applicability in the interpretation of law, rule, or policy, which is further discussed below, there is no basis on which to grant the appellant's appeal.

In considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted

by statute to the Department of Human Services. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010).

N.J.A.C. 4A:7-3.2(n)3 provides that in a case where a violation of the State Policy has been substantiated and disciplinary action recommended, the procedures for the appeal of disciplinary action shall be followed. In this case, since disciplinary action was recommended based on the asserted violation of the State Policy, the appellant's departmental hearing was the proper venue to challenge the findings of the EEO's investigation.

N.J.A.C. 4A:7-3.1(c)1(iii) provides one example of sexual harassment as verbal conduct of a sexual nature which creates an offensive working environment.

N.J.A.C. 4A:7-3.1(c)2(iii) provides that verbal jokes may constitute sexual harassment.

The Commission finds that the appellant's statements violated the State Policy. Although the appellant argues that his comments were meant to stop K.H's redundant questions, it was clearly verbal conduct of a sexual nature that created an offensive working environment. Indeed, when a female employee asks a male employee if he would consider working in her office and he responds he would not because, "I would never get any work done. I would be chasing you around the office" or a similar comment, this is an offensive comment of a sexual nature which violates the State Policy. It is irrelevant if the comment was meant as a joke.

With respect to whether the appellant's statements took place at location that can reasonably be regarded as an extension of the workplace, *N.J.A.C.* 4A:7-3.1(a)1 states, in pertinent part:

> This policy also applies to both conduct that occurs in the workplace and conduct that occurs at any location which can reasonably regarded as an extension of the workplace (any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed).

A violation of the State Policy can occur even if actions take place outside the workplace but involve work-related issues. *See In the Matter of K.S.* (CSC, decided February 4, 2015) and *In the Matter of M.W.* (CSC, decided February 4, 2015). In this matter, the appellant, K.H., and R.A. met for lunch at a restaurant after attending the bi-monthly ERC meeting. The reason that this luncheon took place

was because the appellant, K.H., and R.A. had attended a work-related function and the appellant's statements were in response to a work-related question, *i.e.,* where he would work. Therefore, in this case, the appellant's statements to colleagues during an off-site lunch can reasonably be regarded as an extension of the workplace. With respect to the appellant's argument that K.H.'s September 2, 2014 statement indicates that she felt that he was joking, under *N.J.A.C.* 4A:7-3.1(b), a violation of the State Policy can occur even if there was no intent on the part of an individual to harass or demean another.

In response to the contention that K.H.'s complaint was coerced by management as evidenced by the delay in filing, was done in retaliation for him not accepting an ERC position at HDC, and did not specifically indicate in her initial statement that she was filing a sexual harassment complaint, *N.J.A.C.* 4A:7-3.1(d) states that any employee who believes that she or he has been subjected to any form of prohibited discrimination/harassment is encouraged to promptly report the incident(s) to a supervisor or directly to the State agency's Equal Employment Opportunity/Affirmative Action Officer. Accordingly, while the State Policy *encourages* individuals to file discrimination complaints promptly, there is no mandated timeframe to file a harassment complaint. It also noted that 19 days is not an inordinate amount of time for an individual to wait to file an EEO complaint and there are legitimate reasons why an individual may take some time before filing.

With respect to the appellant's allegations that K.H.'s statements were coerced, an assertion of retaliation, without substantial credible evidence in support of such allegation, is not sufficient to meet the Commission's minor discipline standard in this circumstance. To prevail in a charge of retaliation, the charging party must provide proofs in the form of documents, testimony, affidavits and/or witnesses that would support the charge. While R.A. testified that K.H. did not want to file a complaint and was "flabbergasted" that this matter was continuing, this does not evidence that the appellant did not engage in the prohibited conduct. Further, the appellant did not provide any evidence directly from K.H. that indicates that she was coerced. On the contrary, K.H.'s statement about the incident indicates that she was bothered enough by the appellant's statements that she first went to her supervisor to discuss the matter. Further, the fact that her supervisor encouraged her to report the incident does not evidence that she was inappropriately coerced. In fact, *N.J.A.C.* 4A:7-3.1(e) provides that supervisors shall immediately refer allegations of harassment to the State agency's EEO Officer or designee. Additionally, the mere fact that K.H. described an allegation of sexual harassment in her first statement without using that exact phrase, which was later characterized during the EEO investigation as sexual harassment, is not evidence that she was coerced.

Regarding the appellant's argument that the appointing authority failed to follow its own disciplinary guidelines, that incident was mischaracterized in order to penalize him more severely, that mitigating factors were not considered, that it was inappropriate to charge him with conduct unbecoming a public employee, and other employees who violated the State Policy received lesser discipline, in considering minor discipline matters involving internal policies, the Commission generally defers to the judgment of management, as the interpretation and implementation of its policies are entrusted by statute to the responsibility of the appointing authority. Although the term is not precisely defined, conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. *See In re Emmons,* 63 *N.J. Super.* 136 (App. Div. 1960). Moreover, unbecoming conduct may include behavior which is improper under the circumstances, may be less serious than a violation of the law, but which is inappropriate on the part of a public employee because it is disruptive of governmental operations. In light of the appellant's position as an ERC, the charge of conduct unbecoming a public employee is not inappropriate. Moreover, regardless of the appointing authority's internal guidelines involving discipline, under *N.J.A.C.* 4A:7-3.1(g)3, remedial action may include disciplinary action up to and including termination of employment. As such, it was within the appointing authority's discretion to suspend the appellant for three days without pay under the State Policy.

In response to the argument that there were material errors in the hearing, as the appellant admitted he made the statements, an error recording the date of the incident did not unduly prejudice him at the departmental hearing. Further, the context of the circumstances in this matter indicates the appellant violated the State Policy without considering the appointing authority's comments regarding the "chilling effect" on K.H. Also, procedural flaws in the minor discipline process that are not material to the facts or resolution of an appeal are not sufficient to warrant dismissal of the charges. Additionally, the fact that a witness testified that there was no violation of the State Policy or that a violation cannot occur if State business is not being conducted has no bearing on the determination if a violation did in fact occur. As stated above, regardless of R.A.'s opinion, an off-site luncheon involving work colleagues after a meeting is a reasonable extension of the workplace and therefore it was not necessary for the hearing officer to include these particular comments from the EEO Officer in his report. Additionally, the mere fact that the hearing officer was hired by management, without more, is not an indication that his recommendation was biased and there is no evidence that the hearing officer's experience negatively impacted the departmental hearing. Accordingly, no further review will be conducted 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 7th DAY OF OCTOBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: J.K.
Anita Pinkas
Antoinette Sargent
Mamta Patel
Joseph Gambino