



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of P.F., Department of
Human Services

Request for Reconsideration

CSC Docket No. 2015-3126

ISSUED: **OCT 21 2016** (HS)

P.F., a former Administrator of Plant Services with the Department of Human Services (DHS),¹ requests reconsideration of the final administrative decision, rendered on April 1, 2015, denying his appeal of the determination of the Acting Equal Employment Opportunity (EEO) Director, which did not substantiate any of the petitioner's allegations but found sufficient evidence that the petitioner had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). A copy of that decision is attached hereto and incorporated herein.

The facts of this matter, as well as the petitioner's arguments and the determination of the Civil Service Commission (Commission), are fully laid out in the attached decision.

In his request for reconsideration, the petitioner initially argues that he never admitted during the EEO investigation that the video surveillance was due to his stopping thefts rather than his nationality or national origin. Rather, he stated that the surveillance could have occurred because he is a minority and was discriminatory because no other employee was under surveillance. In addition, the petitioner notes the existence of emails between himself and members of the hospital administration in which he repeatedly questions the reasons for the surveillance. The petitioner argues that in those emails, he stated that the video

¹ Agency records indicate that the petitioner was removed effective November 5, 2015. His appeal of his removal is pending.

surveillance lasted 45 minutes rather than the 20 seconds indicated in the EEO's determination, and his statement was not refuted by the hospital administration. Further, the petitioner contends that a witness statement, provided by P.M. to the EEO in an unrelated investigation, is clear evidence that P.M. made offensive statements about Dominicans. Specifically, P.M. was asked, "Did [the petitioner] behave in this manner because of Ms. [C.]'s gender?" P.M. answered, "Yes, it is my belief that because of [the petitioner's] cultural background, which is Dominican, women are looked down upon and men are superior. I believe that [the petitioner] is intimidated by women who are educated, or in a leadership/supervisory role." The petitioner argues that P.M.'s answer, broadly stating negative views of Dominicans' cultural background, is "patent" discrimination and supports his claim that P.M. made discriminatory remarks about him. However, the petitioner notes that P.M.'s statement was not mentioned in the EEO determination at issue here.²

The petitioner contends that since the EEO did not identify any of the "so-called" credible witnesses, he was deprived of due process and found to have made discriminatory statements based on unidentified sources. According to the petitioner, this "secrecy" is inconsistent with any fairness in DHS proceedings. He contends that a hearing would have provided an opportunity to identify the witnesses, undermine their credibility and challenge their assertions. For example, the petitioner proffers that J.J., "most likely" one of the "credible" witnesses supporting P.M.'s claim that the petitioner made a discriminatory statement about Puerto Ricans,³ has repeatedly made false claims about the petitioner, and thus, J.J.'s credibility could have been fatally attacked at a hearing. In this regard, the petitioner points to EEO determinations dated July 10, 2013 and March 21, 2014 respectively, that included several unsubstantiated allegations by J.J. The petitioner claims that J.J. had a motive to create false accusations against him due to a history of disciplinary actions that the petitioner had issued against J.J.

Finally, the petitioner explains that he did not understand that, in order to prevail on appeal, he had to submit specific evidence in support of his arguments in addition to stating that he had the evidence and desired a hearing.⁴ The petitioner requests that the Commission now review the documentary evidence he submits with this request for reconsideration and grant a hearing.

² P.M.'s answer in the witness statement was not the alleged derogatory remark the petitioner complained of during the EEO investigation at issue here. As noted in the prior decision, no witnesses substantiated the allegation that P.M. had used derogatory language in reference to the petitioner.

³ As noted in the prior decision, the EEO indicated that three credible witnesses substantiated P.M.'s allegation that the petitioner made derogatory remarks against Puerto Ricans.

⁴ It is noted that the petitioner was advised during the appeal process, in writing, that it was anticipated that a decision in the matter would be rendered on the basis of written argument and documentation.

In support, the petitioner submits, among other documents, email communication between himself and the hospital administration; statements from other employees reporting on the questionable use of the camera system; P.M.'s witness statement; a "cease and desist" letter from his attorney; a "Notice of Order to Comply" issued by the Office of Public Employees' Occupational Safety and Health; several of the petitioner's Performance Assessment Reviews; the July 10, 2013 and March 21, 2014 EEO determinations that included unsubstantiated allegations by J.J.; the hospital's digital surveillance system policy; and documents related to a complaint the petitioner has filed with the federal Equal Employment Opportunity Commission.

In response, the EEO counters that the petitioner's interview with its investigators was recorded and transcribed. The petitioner reviewed and corrected the statement as he thought necessary and ultimately signed the statement. The petitioner was asked, "Why do you think they were videotaping you?" The petitioner responded as follows:

Because I caught [J.J.] and [F.M.] doing illegal activities of remotely shutting the HVAC system down so that they could get comp time off. I reported their activities to [B.C.] and I instructed the contractor to eliminate the remote control from the laptop. Since that time, it hasn't happened. [J.J.] and [F.M.] are good friends with the security department. I feel that [J.J.] and [F.M.] told [B.T.] and [B.B.] to focus the camera directly into my office. I feel their intent was to see if I was involved in anything illegal so they can get rid of me.⁵

The petitioner was then asked the following question:

When I spoke to you on July 12, 2012, you told me that the camera was put outside of your window and you were targeted because the engineers are stealing and you stopped them from stealing. Is that what you are speaking of in your answer to my previous question?

The petitioner answered, "Yes" and made no claim of national origin discrimination. The EEO reiterates that it viewed the video in question and found no evidence of any surveillance of the petitioner. It argues that the credibility questions must fall against the petitioner as he continually alleges that he is the victim of an illegal surveillance, yet there was no evidence of any surveillance. The EEO adds that the matter is "moot" in the context of employment discrimination in that the petitioner admitted a non-discriminatory purpose for the alleged surveillance. In addition, the

⁵ It is noted that in one of the petitioner's emails, sent June 15, 2012 at 6:31 a.m. and submitted in this matter, he described a substantially similar scenario: the petitioner stated that the targeted surveillance began after he successfully stopped the misuse of the laptop to create HVAC system breakdowns and gain comp time. He also stated that he was being "set up."

EEO contends that P.M.'s statement regarding the petitioner's motivations for his actions does not impact its determination regarding the petitioner's complaint. Further, it states that it has no obligation to identify witnesses to the petitioner unless he is charged and files for discovery. In sum, the EEO maintains that its findings did not indicate that the petitioner had been subjected to a violation of the State Policy and that he has not presented a sufficient basis to grant reconsideration.

CONCLUSION

Initially, the appellant requests a hearing in this matter. However, requests for reconsideration 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).

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding. A review of the record reveals that the petitioner has not met the standard for reconsideration.

The petitioner has submitted evidence and information that was not presented at the original proceeding. The petitioner explains that this material was not presented originally because he did not understand that he had to submit specific evidence in support in addition to stating that he had the evidence and desired a hearing. This explanation is not persuasive. In this regard, *N.J.A.C. 4A:7-3.2(m)4* provides that the appellant has the burden of proof in all discrimination appeals brought before the Commission. In addition, the petitioner was advised during the appeal process, in writing, that it was anticipated that a decision in the matter would be rendered on the basis of written argument and documentation.

Regardless, in the instant matter, the petitioner has not presented new evidence or additional information that would change the outcome of his case, nor has he shown that a clear material error occurred. The petitioner claims that he never admitted during the EEO investigation that the video surveillance was due to his stopping thefts rather than his nationality or national origin; that he stated that the surveillance could have occurred because he is a minority; that he repeatedly questioned the reasons for the surveillance via email; and that his statement that

the surveillance lasted 45 minutes rather than the 20 seconds indicated in the EEO's determination went unrefuted. However, these claims and the various documents submitted do not evidence a connection between the surveillance and the petitioner's national origin, his nationality or the fact that he is a minority. For instance, in the petitioner's email sent June 15, 2012 at 6:31 a.m., the petitioner noted that the surveillance started after he ended the misuse of the laptop. The petitioner also claims that P.M.'s answer in the witness statement is evidence of P.M.'s offensive statements about Dominicans. However, P.M.'s answer in the witness statement was not the alleged derogatory remark the petitioner complained of during the EEO investigation at issue here. Moreover, as noted in the prior decision, no witnesses substantiated the allegation that P.M. had used derogatory language in reference to the petitioner. Thus, P.M.'s witness statement is not substantive evidence that the EEO should have substantiated the allegation that P.M. made a derogatory remark about the petitioner being Dominican.⁶

The petitioner also contends that he was deprived of due process during the EEO investigation since the witnesses were unidentified and he was unable to challenge their credibility. However, the State Policy provides for a confidential process:

All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

N.J.A.C. 4A:7-3.1(j). Therefore, the petitioner was not entitled to learn the identity of witnesses or confront them during the EEO's investigation.⁷ Moreover, in discrimination appeals, the initial credibility determinations are rendered by the EEO. See *In the Matter of Dr. Felix Salzberg* (CSC, decided July 21, 2010).

⁶ The petitioner is advised that he may file a new complaint with the EEO regarding P.M.'s answer in the witness statement, should he be reinstated to employment. See *N.J.A.C. 4A:7-3.2(a)*.

⁷ However, it should be noted that in cases where an appointing authority pursues disciplinary action based on the results of an investigation into alleged discrimination or harassment, the party charged has the right to appeal using the disciplinary appeal procedures. See *N.J.A.C. 4A:7-3.2(n)3*. Those procedures do allow for the opportunity to examine witnesses. See, e.g., *N.J.A.C. 4A:2-2.6(c)*.

Although the petitioner here disputes J.J.'s credibility, pointing to the fact that several of his allegations during other investigations were unsubstantiated, complaints made in good faith, even if found to be unsubstantiated, are not to be considered false accusations. See *N.J.A.C.* 4A:7-3.1(i). Other than the petitioner's assertions, he has not provided substantive evidence to indicate that J.J. knowingly made false accusations against the petitioner or that J.J. was otherwise not credible. Nevertheless, even assuming that J.J. was one of the three witnesses the EEO relied on to substantiate the allegation that the petitioner made derogatory remarks against Puerto Ricans and that such reliance was misplaced, there still would have remained two other witnesses found credible and who supported that allegation. Thus, the EEO's credibility findings and its resolution of that allegation have not been sufficiently challenged.

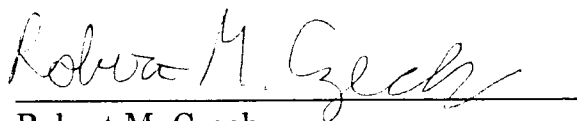
Finally, the Commission must express its concern regarding the petitioner's possession of a copy of P.M.'s witness statement from an unrelated investigation. The record is unclear as to how the petitioner came into such possession, and the Commission is thus concerned that the confidentiality provision of the State Policy, *N.J.A.C.* 4A:7-3.1(j), could have been violated. Therefore, it is appropriate to refer this particular issue to the EEO so that it can initiate an investigation and, if warranted, take appropriate action in accordance with *N.J.A.C.* 4A:7-3.1(k).

ORDER

Therefore, it is ordered that this request for reconsideration be denied and the issue of the petitioner's possession of P.M.'s witness statement be referred to the Office of Equal Employment Opportunity for further investigation consistent with this decision.

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 19TH DAY OF OCTOBER, 2016



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Attachment

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