



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of G.E.,
Office of Information Technology

CSC Docket No. 2016-765

Discrimination Appeal

ISSUED: **NOV 30 2016** (DASV)

G.E., an Administrative Assistant 1 with the Office of Information Technology (OIT), represented by Dudley Burdge, Senior Staff Representative, CWA Local 1032, appeals the determination of the Chief of Staff, finding that she had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, a Caucasian, was informed that an investigation was conducted as a result of a complaint against her. As set forth in the determination, the investigation revealed that the appellant made the following statements: "Sometimes I wish I could just slap the black off of her" and "Just look at our database - we have so many Patels.¹" The appointing authority determined that the appellant violated the State Policy and created a hostile work environment on the basis of race for the first comment and national origin or ethnicity based on the second comment. The appellant received training on the State Policy for the violations and a counseling memorandum.

On appeal to the Civil Service Commission (Commission), the appellant disagrees with the appointing authority's determination, maintaining that she has been "an exemplary public servant" for more than 25 years and has never had a complaint made against her. She notes that the remarks were allegedly made in early 2014, but T.T., an African American Personnel Assistant 1, did not file a

¹ There were two alleged incidents, occurring in January 2015 and March 2015, regarding the employees' last name.

complaint until March 2015. The appellant states that she has always been on speaking terms with T.T., but sometime in February 2015, the appellant asserts that T.T. began "singling [her] out and taking steps to harass, embarrass and belittle" the appellant. T.T. would tell the appellant that she or her radio was too loud, despite that other individuals are louder than the appellant and T.T. did not say anything to them. The appellant states that she would not respond disrespectfully to T.T. and would turn her radio down or lower her voice. Moreover, the appellant indicates that she requested a meeting with L.S., a former Manager 2, Human Resources,² after T.T.'s "second outburst" but "very little was done." Furthermore, the appellant believes that T.T. made the allegations against her as a result of the retirement of C.C., a former Personnel Assistant 1.³ The appellant explains that she was asked whether she would "be able to step up" and take on some of C.C.'s responsibilities. At this time, T.T. filed the complaint against the appellant because she "was clearly threatened by no longer being the sole person who understands and does the work that she does at that level." The appellant asserts that even L.S. and the Chief of Staff had said to her that T.T. "was threatened" by the appellant. Additionally, the appellant claims that she was the only one that T.T. excluded from work parties. She presents two e-mail invitations in that regard. The appellant also contends that L.S. enabled T.T.'s behavior because T.T. allegedly felt that she was being "singled out."

In addition, the appellant denies that she said, "Sometimes I wish I could just slap the black off of her" and requests a copy of the investigative materials. She contends that if T.T. was so insulted by the comment, why did T.T. wait 15 months to complain about it. As to the March 2015 comment, the appellant maintains that her statement was taken out of context and she actually said, "There are several Patel's in the database, let alone your unit specifically, which one are you referring to?" The appellant states that she was speaking to the Assistant Division Director of Enterprise Support Services, S.O., an African American, on the telephone regarding changes to the organizational chart of his division and an identification card for one of his employees. The appellant maintains that her comment was not derogatory or intended to discriminate or be offensive. In support of her appeal, the appellant submits a letter from L.S., verifying that she scheduled a meeting with the appellant and T.T. in early March 2015. However, T.T. responded that she was being "singled out" and L.S. met with T.T. without the appellant. In the meeting, L.S. indicated that T.T. said that she reported "a racial comment that bothered her." L.S. was never informed of this claim and asked T.T. why she waited 15 months to report the remark. T.T. advised L.S. that "she didn't know and didn't want to get anyone in trouble." L.S. met with the appellant the next day. L.S. also stated that she has worked with the appellant for many years and the appellant has never been biased or discriminatory to anyone. L.S. explained that the appellant is responsible for the organizational charts for the agency and there is "a magnitude of similar

² L.S. retired from State service effective October 1, 2015.

³ C.C. retired from State service effective May 1, 2015.

names or related individuals with the same last name.” The appellant also submits a letter acknowledging her hard work from the Director of Financial Management, a letter of recommendation from S.O., a letter from L.S. verifying the appellant’s higher level duties for a position classification review, e-mails from various individuals about her work, her Performance Assessment Review, and an organizational chart of Enterprise Support Services highlighting that there are seven employees with the last name of Patel.

In response, the appointing authority states that the period of time the appellant has been a State employee and her job responsibilities and performance are irrelevant to the complaint. Moreover, the appointing authority maintains that the relevant issue is the complaint itself, not when it was filed. It also states that the appellant’s relationship with T.T. and her alleged actions towards the appellant are immaterial, since they are not proof that the appellant did not make the remarks. Further, as to the investigation, the appointing authority indicates that it revealed that the appellant made “the Patel comment” on two occasions and she admitted to uttering those remarks during her interview. She made the comments in January 2015 when reviewing a database, and in March 2015, when she was talking and joking on the telephone with S.O. The appellant’s comments on both occasions were overheard and corroborated by a witness. In addition, as to the appellant’s request for the investigative materials, the appointing authority indicates that it only relied on the investigator’s notes of the appellant’s interview, which she initialed as accurate, and the statement of a corroborating witness. The appointing authority submits a copy of the investigator’s notes of the appellant’s interview. The notes reveal that when questioned about the incident⁴ and the statement, “Sometimes I wish I could just slap the black off of her,” the appellant stated that, “I don’t ever recall saying that.” Regarding the second statement, the notes indicate that during January 2015 and on March 16, 2015, the appellant was heard speaking loudly with sarcasm about the excessive number of people named Patel being hired or presently employed. She was asked what the meaning was behind her comments. In response, the appellant stated that with regard to the January 2015 remark, she “meant just look at our database we have so many Patels.” Regarding the March 2015 incident, the appellant reported that she was on the telephone with S.O. “joking with him because he has a boat load of employees currently named Patel.”

⁴ As set forth in the interview notes, the following incident allegedly occurred: the appellant appeared to be getting frustrated while speaking on the telephone. When she finished the call, the appellant asked T.T., who was waiting to see her, if she knew a certain individual from the Department of Law and Public Safety. The appellant made a comment that this individual was being stupid and that she makes “X” amount of dollars to do what she does. The appellant said that she always had to repeat herself because that individual never got her instructions right. The appellant then asked T.T. if she could ask her something without her taking offense. T.T. said the appellant could, and the appellant then stated that “I’ve never met anyone who was that stupid. Sometimes I wish I could just slap the black off of her.”

The appellant replies that the appointing authority failed to treat her fairly during the investigation because it solely based its decision on T.T.'s unsupported representation and the statement of the unidentified corroborating witness. The appellant contends that she is unable to refute the claims of this witness since the appointing authority has refused to furnish the investigative materials despite several requests. Moreover, the appellant argues that the statement "just look at our database we have so many Patels" "is at best not discriminatory." She reiterates that she was speaking with S.O. and T.T. did not know the context of the conversation. Further, the appellant maintains that S.O. was never interviewed, although he is "a key witness." L.S. was also not interviewed. The appellant submits a statement from S.O., indicating that he was not interviewed and he did not consider the conversation he had with the appellant to be "in violation of Title VII." The appellant also presents L.S.' letter (as previously noted) in support of her appeal, as well as a listing of numerous pension members with the last name of Patel. Further, the appellant argues that the lack of a thorough investigation is a deprivation of her due process under the 14th Amendment and New Jersey law. Moreover, the appellant contends that the investigation does not support her making the first alleged statement. She reiterates that she did not make such a remark, and the investigator's interview notes indicate that she did not recall the incident. No witness ever substantiated this claim, except for T.T. who feels threatened by the appellant.

It is noted that the appellant requested the investigative materials from the appointing authority, which responded that "the investigation and statements are confidential at this juncture" and will not be provided unless the Commission directs it to do so. Moreover, the appointing authority provided the following information to the appellant:

Here is [Equal Employment Opportunity/Affirmative Action Officer Ronald Brown's] summary of the relevant part of the statement regarding Patels, relied upon in making our finding on that. The statement about Patels was heard by the Complaining Party and by another witness. During the investigation, a witness was interviewed. The interviewer made the following statement and asked the following question: During January 2015 and on March 16, 2015, [G.E.] was alleged to have spoken loudly and with sarcasm, about the excessive number of people named Patel being hired by OIT. Do you recall this and if so, what do you believe was the meaning behind the comments. The witness did recall this and thought the meaning behind the comments was racism and rudeness.

CONCLUSION

Initially, there is no time frame in which to file a discrimination complaint. In that regard, *N.J.A.C. 4A: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, or who witnesses others being subjected to such 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 or to any other persons designated by the State agency to receive workplace discrimination complaints. Further *N.J.A.C.* 4A:4A:7-3.2(a) emphasizes that all employees and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy, *N.J.A.C.* 4A:7-3.1. Therefore, although T.T. may not have reported the alleged violation immediately, it does not mean that a violation did not occur or that the appellant is excused under the circumstances. Nevertheless, *N.J.A.C.* 4A:7-3.2(c) provides that every effort should be made to report complaints promptly. Delays in reporting may not only hinder a proper investigation, but may also unnecessarily subject the victim to continued prohibited conduct. Accordingly, although the Commission is concerned with the delay in reporting the incidents, T.T.'s motivation in reporting them 15 months later is irrelevant as to whether the appellant actually committed the infractions. *See e.g., In the Matter of E.H.* (CSC, decided April 1, 2015) (While the appellant attempts to explain the circumstances surrounding the filing of the complaint against her and the motivation for filing, the fact remains that the investigation confirmed a violation of the State Policy).

Additionally, the appellant requests the investigative materials in this matter. However, the release of confidential investigative materials is generally required when the Commission is unable to make an informed determination of the issues in question based on the record. *See In the Matter of Theresa Lockette* (MSB, decided May 7, 2003). In the instant matter, the Commission has a complete record before it upon which to render a fair decision on the merits of the appellant's appeal, and the Commission is satisfied that the appellant has had a full opportunity to present evidence and arguments on her behalf. *See In the Matter of Juliann LoStocco, Department of Law and Public Safety*, Docket No. A-0702-03T5 (App. Div. October 17, 2005); *In the Matter of Salvatore Maggio* (MSB, decided March 24, 2004). In that regard, the appellant was provided with the investigator's notes of her interview and a summary of the investigative findings surrounding her alleged comments. Accordingly, the Commission does not find it necessary to compel production of the investigative materials in this matter.

With regard to the merits of the appellant's appeal, *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. To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New

Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment. Additionally, *N.J.A.C. 4A:7-3.1(b)* states that 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 set forth in (a) above. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

The Commission has reviewed the instant matter and finds that the appointing authority's determination was proper with respect to the first comment. On appeal, the appellant denies that she stated, "Sometimes I wish I could just slap the black off of her." However, the Commission does not find her denial credible. During her interview, the appellant did not outright deny making the statement, but rather, stated that "I don't ever recall saying that." However, not recalling is not consistent with a denial. Moreover, the claim was very specific and provided a detailed narrative of the circumstances in which the statement was made. The Commission finds it unlikely that such an unusual remark would have been fabricated by T.T. Therefore, since the Commission does not find any credible contrary information to reverse the finding that the appellant uttered such a statement, which is clearly a violation of the State Policy based on race, the appellant has not sustained her burden of proof and the Commission upholds the determination that the appellant violated the State Policy in that regard.

With respect to the second comment, which actually occurred on two separate occasions, the appellant admits to her statements. However, the Commission does not find that they violate the State Policy. First, the Commission notes that the State Policy does not require that all witnesses be interviewed. However, in this case the appointing authority failed to interview a relevant witness. S.O. was a party to the complained of conversation and would have provided material information. However, he provided a statement on appeal. It is noted that solicitation of witness statements is generally frowned upon due to the confidentiality of an investigation and the appearance of an impermissible interrogation of a witness. *See e.g., In the Matter of W.R.* (CSC, decided November 7, 2013); *In the Matter of Tiffany Tyson* (CSC, decided March 24, 2010). Nonetheless, S.O. was not interviewed and the Commission is cognizant of the fact that the appellant must be given the opportunity to adequately challenge the finding that she violated the State Policy. *See In the Matter of Virginia Larry* (CSC, decided October 8, 2008) (If an appellant is not permitted to request that witnesses to an investigation provide information or statements to the Commission during the appeal process, then it would essentially be impossible for him/her to challenge the sufficiency of the investigation). In that regard, the appellant has shown that her statements were not discriminatory in the context of when and how they were said.

As to the January 2015 incident, neither the appointing authority nor the appellant provide much information. Nonetheless, the appellant was apparently reviewing a database and exclaimed that there were "many Patels." No further context to the circumstances surrounding that comment, other than the perception that the comment was sarcastic, has been provided. Thus, it cannot be determined that the appellant's comment was offering a derogatory opinion about the ethnicity of the employees. Further, the appellant's statement was factual. It is emphasized that although the appellant may have spoken loudly and was perceived to have been sarcastic, such perceived behavior, in and of itself, is insufficient to sustain a violation of the State Policy. Similarly, during the March 2015 incident, there is insufficient evidence in the record that the appellant made a derogatory remark or demeaning reference to the ethnicity of the employees. She again made the observation that there were many individuals with the last name of Patel. S.O.'s statement corroborates that their conversation did not implicate the State Policy. Further, the record demonstrates that the comment was made in the context and performance of the appellant's job duties. Accordingly, the Commission finds that the appellant did not violate the State Policy in this regard. It is emphasized that although *N.J.A.C. 4A:7-3.1(b)* provides that a violation of the State Policy can occur even if there was no intent on the part of an individual, alleged discriminatory remarks must be reviewed in their proper context.

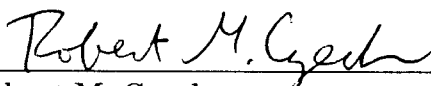
Accordingly, the Commission upholds the determination that the appellant violated the State Policy with regard to the first statement and finds that the appointing authority appropriately required, under the circumstances presented, the appellant's training and counseling memorandum. As to the second comment, the appointing authority shall place this determination in and make any necessary corrections to the appellant's personnel record to reflect that the allegation that she violated the State Policy in the second instance was not substantiated.

ORDER

Therefore, it is ordered that this appeal be granted in part.

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 NOVEMBER, 2016



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