

the complaint. The appellant emphasizes that she did not decline to participate in an interview and claims that she was never scheduled for a formal interview. In this regard, the appellant provides a written statement dated January 5, 2015 that she submitted to the OAAWC indicating that she was not provided with the actual text of the complaint, the nature of the alleged discrimination, or the facts. The appellant states that her January 5, 2015 statement confirms that she did not know the specifics of the incident. Further, the appellant contends that the final letter of determination did not comply with the provisions of *N.J.A.C. 4A:7-3.2(l)*. Moreover, the appellant asserts that she notified the investigator that the Provost stated in a meeting on November 20, 2014 that the incident was not actionable.

Additionally, the appellant contends that the determination improperly substantiated a State Policy violation on the basis of sex/gender. Specifically, the appellant argues that a State Policy violation cannot be substantiated based on the allegation that she stated the words "fat bitch" at the time of the incident. The appellant explains that, at the time of the incident, she was addressing an unnamed person who was not present, which was confirmed in the May 21, 2015 determination letter. In this regard, the appellant asserts that a one-time use of flippant language does not constitute unwelcome behavior or third party harassment. Further, the appellant states that her behavior was not sexual in nature. In this regard, the appellant explains that although the State Policy is a zero tolerance policy, it is clear that the prohibited speech must be discriminatory on the basis of sex in order to substantiate a State Policy violation. The appellant adds that there is no evidence that the alleged comments interfered with J.W.'s work performance after the incident occurred. Therefore, it cannot be substantiated that J.W. was subjected to third party harassment. In support, the appellant submits a copy of the OAAWC's December 11, 2014 letter advising her of the complaint and that she would be scheduled for an interview with the investigator. She also submits a copy of her written statement dated January 5, 2015.

In response, the OAAWC, represented by Michael A. Tripodi, Esq., Vice President and General Counsel, maintains that the investigation revealed that the appellant uttered the words "fat bitch" on October 29, 2014 at the Convening Group meeting which was overheard by J.W. In this regard, three witnesses and J.W. corroborated that the appellant made the offensive comments. The OAAWC adds that the investigation confirmed that the appellant was looking at J.W. at the time of the incident, and that the appellant stated, after a pause, that the comments were directed toward the Provost. However, the appellant disputed whether the comments were directed at J.W. or anyone other than the Provost. Further, the OAAWC contends that the appellant did not deny making the comments at the time of the incident, and she admitted that she spoke to the Provost about the incident at a meeting on November 20, 2014. In addition, the OAAWC asserts that J.W. is concerned that she may be subjected to continued harassment from the appellant if she attends any future Convening Group meetings where the appellant is in

attendance. As such, since J.W. cannot attend the meetings, the appellant's comments had an adverse effect on her work performance. The OAAWC adds that the appellant participated in the investigation process despite the fact that she declined to be formally interviewed as it considered her January 5, 2015 written statement.

In response, the appellant asserts that her due process rights were violated. In this regard, the appellant explains that the OAAWC wrongfully decided that her participation in the investigation process was not needed and does not explain why she was not interviewed. As such, the appellant contends that the determination is a one-sided summary of what occurred. Further, the appellant states that she was not provided with adequate notice since she was not provided with a copy of the complaint. In addition, the appellant avers that the Provost's comments regarding the incident were not considered by the OAAWC. In this regard, the appellant asserts that, since the Provost was not offended by the remarks, J.W.'s arguments should be disregarded. In support, the appellant provides a partial transcript of her telephone conversation that she recorded with the investigator on December 19, 2014 in support of her arguments. The appellant states that the full text of the conversation can be provided upon request.

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. This policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by this policy. See *N.J.A.C.* 4A:7-3.1(a)2. 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.

N.J.A.C. 4A:7-3.1(j) establishes that all discrimination 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 the 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.

The Commission has conducted a review of the instant matter and finds that the appellant engaged in conduct in violation of the State Policy. The record shows that the OAAWC conducted an adequate investigation. It interviewed the relevant parties in this matter and appropriately analyzed the available documents in investigating J.W.'s complaint. Specifically, the OAAWC interviewed the complainant and three witnesses, and it was corroborated that the appellant stated "fat bitch" at the time of the incident. The use of that term is considered gender-based and inappropriate under the State Policy. Although the appellant argues that she did not direct the offensive comments toward J.W., she does not deny that she made the offensive comment. Further, three witnesses overheard the comment, and J.W. clearly was offended by the remark. Although the appellant argues that the comment was directed toward the Provost, its usage constitutes third party harassment. In this regard, the appellant did not rebut the fact that the J.W. is unable to attend any future Convening Group meetings when the appellant is present. As such, the fact that J.W. continued to teach her classes does not negate that the appellant's offensive language subjected her to third party harassment.

With regard to the definitions the appellant provides on appeal for the word "bitch," such information is not sufficient to establish her contentions that she did not violate the State Policy. The *Merriam-Webster* dictionary defines the word "bitch" as a lewd or immoral woman [and] a malicious, spiteful, or overbearing woman –sometimes used as a general term of abuse (www.merriam-webster.com/dictionary/bitch). As intent is not required to substantiate a violation, the Commission finds that a derogatory remark referencing a woman's gender can be perceived as an offensive term. Moreover, it cannot be ignored that the State Policy mandates a zero tolerance policy for offensive statements referring to a person's gender. 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 definitions under State or federal statutes of discrimination or harassment. See *In the Matter of G. M.* (MSB, decided February 27, 2008).

In response to her argument that she could not properly respond to the allegations as she did not receive a copy of the complaint and not scheduled for an

interview, other than her tenuous allegations, she has not established her contentions. The record reflects that, by letter dated December 11, 2014, the OAAWC notified the appellant of the complaint and the allegations of sex/gender discrimination. A review of the letter clearly indicates that the complainant, J.W., alleged that [the appellant] made comments during a Convening Group meeting that were offensive to [J.W.] and created a hostile work environment. The appellant admits on appeal that she received the December 11, 2014 letter and it referenced the complaint against her. She also admits that she discussed the matter with the OAAWC investigator in a telephone conversation on December 18, 2014. The Commission is satisfied that the investigator's December 11, 2014 letter attempting to schedule her for an interview provided her with sufficient notice of who filed the complaint, the allegations against her, and offered her the opportunity to respond to the complaint. Similarly, the Commission finds that the final letter of determination substantially complies with the requirements of *N.J.A.C. 4A:7-3.2(l)*.

Regarding the appellant's argument that she could not properly respond to the allegations against her since she did not receive a copy of the complaint, as noted above, discrimination complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. *See N.J.A.C. 4A:7-3.1(j)*. As such, *N.J.A.C. 4A:7-3.2(g)* specifies that a written record of the complaint shall be maintained as confidential a record to the extent practicable and appropriate. Moreover, it is clear that the OAAWC provided sufficient information in its December 11, 2014 letter for the appellant to respond to the allegations. In addition, the appellant admits that, in response, she submitted a written statement dated January 5, 2015 and the OAAWC confirms that it reviewed the statement. With respect to the appellant's argument that she was not interviewed, it is clear that the OAAWC attempted to interview the appellant based on the December 11, 2014 letter and the fact that the investigator contacted her by telephone on December 18, 2014 to solicit her response. While it is unclear from that uncertified transcript if she actually declined at some point to participate in a formal interview, the appellant ultimately submitted her January 5, 2015 written statement. Thus, the appellant was provided more than sufficient opportunity to rebut the charges during an interview and she failed to avail herself of those opportunities. Regardless, three witnesses and J.W. were interviewed who substantiated that the appellant used the offensive language at the time of the incident and the appellant has provided no argument or evidence to challenge these assertions.

With regard to the appellant's argument that the Provost indicated that the matter was not actionable, it is unclear if the Provost was referring to the appellant's conduct in the context of a disciplinary matter or as a State Policy violation. Even assuming the validity of that statement, such information is of no moment. Complaints and investigations that fall under the purview of the State Policy are administered in accordance with Title 4A of the Administrative Code.

N.J.A.C. 4A:7-3.2(j)4 provides that an investigatory report will be prepared by the EEO/AA Officer or his or her designee when the investigation is completed and the investigatory report will be submitted to the State agency head, who will issue a final letter of determination to the parties. The State agency head or designee will review the investigatory report issued by the EEO/AA Officer or authorized designee, and make a determination as to whether the allegation of a violation of the State Policy has been substantiated. If a violation has occurred, the State agency head or designee will determine the appropriate corrective measures necessary to immediately remedy the violation. See *N.J.A.C.* 4A:7-3.2(k).

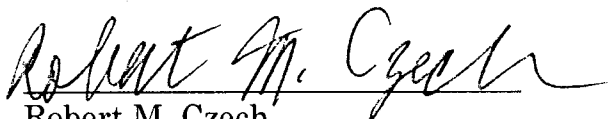
Accordingly, the OAAWC's investigation was thorough and impartial, and therefore, the appellant has failed to meet her burden of proof and the record supports that the appellant violated the State Policy. If it has not already done so, the appointing authority is directed to determine if administrative remedies are appropriate in this case.

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 23rd DAY OF NOVEMBER, 2016



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