

B-104



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of C.L.,
Department of Human Services

CSC Docket No. 2016-1487

Discrimination Appeal

ISSUED: DEC 09 2016 (DASV)

C.L., a Program Support Specialist 1, Assistance Programs, appeals the determination of the Assistant Commissioner of the Department of Human Services (DHS), stating that the appellant failed to present sufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, who is currently 61 years old and is a Caucasian female, filed two complaints on February 6, 2009 and a complaint on February 10, 2014 and December 8, 2014,¹ alleging that she had been discriminated against based on age, religion, and race. Specifically, the appellant claimed that the Division of Family Development (DFD) denied her promotions to Administrative Analyst 1² and Supervisor, Standards and Procedures³ because of her age, Jewish religion, and marriage to an African American. She also alleged disparate treatment in reference to the Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list.⁴ Additionally, the appellant asserted in 2014 that because of her age, religion, and marriage, D.R., a Supervising Program Support Specialist, Assistance Programs assigned her field work at the Monmouth County Welfare Agency. In response, the Office of Equal Employment Opportunity (EEO)

¹ The appellant's four discrimination complaints were in the form of grievances.

² The title is now named Administrative Analyst 4.

³ The title is now named Standards and Procedures Technician 4.

⁴ It is noted that the appellant did not file appeals to the Civil Service Commission regarding her non-appointments or bypass of her name on eligible lists noted herein.

conducted an investigation, which included interviewing five witnesses and reviewing 10 documents. It found that there was no "selection process" for Administrative Analyst 1 at the time. However, a promotional announcement was issued on September 11, 2008 for Administrative Analyst 2, but the appellant did not apply. Moreover, the person appointed to the position of Supervisor, Standards and Procedures on January 30, 2009 ranked number three on the (PS5561K) eligible list⁵ and was thus reachable for appointment. It is noted that the appellant ranked number one on the (PS5561K) eligible list. She was bypassed on the January 30, 2009 certification, which was the only certification of the list. Additionally, the appointee is currently 42 years old and had served as a provisional Supervisor, Standards and Procedures beginning in 2006. Additionally, the Office of EEO found that only one eligible, who is currently 64 years old, appeared on the Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list.⁶ He was appointed effective January 29, 2009. It is noted that the appointee had been provisional in the title beginning in 2005. Moreover, the Office of EEO analyzed the demographic statistics by race and gender for DFD new hires beginning in 1981 and for promotions in 2008 and determined that the data adequately reflected the diversity of the division. The information did not capture religious affiliation. As to the appellant's assignment to the Monmouth County Welfare Agency, the Office of EEO found no evidence that the assignment was made for reasons other than operational needs. The Office of EEO reviewed the Interview Response Form signed by the appellant on November 4, 2009, which indicated that she was interested in field work and understood that transportation may not be provided. Therefore, the appointing authority determined that the investigation did not substantiate a violation of the State Policy.

On appeal to the Civil Service Commission (Commission), the appellant states that she is the only Jewish employee supervised by D.R., and M.S., a former Assistant Division Director,⁷ is married to an African-American man, and is over the age of 50. She maintains that she was subjected to discriminatory hiring and promotional practices, in violation of her union contract and Civil Service rules. In that regard, she indicates that on January 8, 2009, she received a letter from the DFD, stating that it was not going to fill the Administrative Analyst 1 position, despite that a promotional (PS5546K) eligible list promulgated for the title⁸ and there were provisionals. The appellant was ranked number one on the (PS5546K) eligible list. It is noted that after the (PS5546K) eligible list was generated and a certification was issued on October 2, 2008, the appointing authority requested a waiver of the appointment requirement from the Commission. It stated that there

⁵ The Supervisor, Standards and Procedures (PS5561K) eligible list promulgated on January 29, 2009 and expired on January 28, 2012.

⁶ The Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list promulgated on January 29, 2009 and expired on January 28, 2012.

⁷ M.S. retired from State service effective February 1, 2016.

⁸ The Administrative Analyst 1 (PS5546K) eligible list promulgated on September 4, 2008 and expired on September 3, 2011.

were no longer provisionals serving in the title and it intended to make an appointment prior to the expiration of the (PS5546K) eligible list. Based on the foregoing, the Commission granted an appointment waiver and deferred selection costs in the matter. *See In the Matter of Administrative Analyst 1 (PS5546K) (CSC, decided June 10, 2009)*. However, since the appointing authority did not utilize the (PS5546K) eligible list prior to its expiration, it was subsequently assessed selection costs. *See In the Matter of Administrative Analyst 1 (PS5546K) (CSC, decided February 2, 2011)*.

Moreover, the appellant indicates that she received another letter from the DFD on January 8, 2009, stating that it had filled the job opportunity for Supervisor, Standards and Procedures with another employee. The appellant argues that the appointing authority filled the position two weeks prior to the issuance of the Supervisor, Standards and Procedures (PS5561K) eligible list, "contradicting Civil Service regulations." The appellant also challenges the appointment of the eligible on the Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list. She contends that the eligible was made permanent despite that he was the only eligible on the list. By contrast, the appellant asserts that she was the only eligible on the eligible list for Contract Administrator 2 (PS0215K), but she was not appointed.⁹ The appellant states that the "DFD is not obligated to use an incomplete list, but arbitrarily decides to use such lists for some employees, but not for others." The appellant submits charts, which she asserts illustrate the disparate pattern of appointment and promotion in the DFD Office of Budget and Financial Management, showing favoritism towards Caucasian, Christian and Asian-American (Indian/Pakistani) employees, while discriminating against Jewish and African-American employees.

In addition, although the appellant acknowledges that she does not possess a vested right to an appointment, she maintains that an appointment should be made from a list so long as it remains in force. Further, as an example of disparate treatment, the appellant submits that the five eligibles appointed from the Supervising Program Support Specialist, Assistance Programs (PS8064K) eligible list¹⁰ were all Caucasian Christians. It is noted that the appellant is ranked third on this list and her name was bypassed on the July 23, 2013 certification. The appellant also indicates that in 2012, she sent an inquiry to the DFD Human Resource Office, as she heard from other applicants that a college transcript was required regarding the Supervising Program Support Specialist, Assistance Programs (PS8064K) examination. It responded that it advises employees as a "courtesy" to attach a transcript because sometimes credit is given for the courses.

⁹ The Contract Administrator 2 (PS0215K) eligible list promulgated on April 23, 2009 and expired on April 22, 2012, with no certifications of the list. The appellant was not a provisional employee in that title.

¹⁰ The Supervising Program Support Specialist, Assistance Programs (PS8064K) promulgated on July 18, 2013 and expired on July 17, 2015.

The appellant claims that, if that was the case, it was "peculiar" that it was not communicated to her.

Furthermore, the appellant maintains that D.R. harassed her based on her prior EEO complaints. She explains that, in previous years, she had been assigned to field locations accessible by public transportation. However, D.R. assigned her to the Monmouth County Welfare Agency on December 8, 2014, at which time a State car was unavailable. D.R. also did not specify a start date until the appellant inquired about it. The appellant notes that her co-worker, who is an African-American Christian female does not own a personal vehicle and was never assigned to a location without a State car being available or to a location that is not accessible by public transportation. The appellant notes that she had to rent a car for \$181 per week because of the reassignment. She disputes that there was business necessity to have reassigned her when there were only 12 cases to review the entire week and employees are supposed to review 15 cases per day. Moreover, the appellant alleges that the DFD Human Resource Manager and Employee Relations Coordinator have refused to assist her regarding a reassignment. She had requested a reassignment out of her current unit, so that she is no longer supervised by D.R.

As to the investigation of her complaint, the appellant objects to the fact that the appointing authority did not disclose the names of the five individuals it interviewed or the documents it reviewed. She maintains that "[t]his non-disclosure does not facilitate an evaluation as to the alleged 'thoroughness' of [the] investigation." Moreover, the appellant states that "verbal statements" were required of her, but contends that employees should have the right to respond in writing to questions. Additionally, the appellant notes that she is not permitted to receive a copy of her statement because it is "confidential." She asserts that "[t]his position is ludicrous!"

The appellant also contends that her complaint was not properly investigated. She asserts that the EEO Officer told her that he had no way to determine the religion of the employees who were appointed other than to question them, which he would not do because it would create further problems. Thus, the appellant submits that an inadequate analysis was conducted to determine whether a disparate impact occurred because of her Jewish religion and interracial marriage. The appellant also asserts that her complaints were not timely investigated. The determination of her complaints was not issued until September 22, 2015, six years after the initiation of her 2009 complaints. The appointing authority did not explain why the investigation could not be concluded in a timely manner.

Further, the appellant indicates that the DFD made provisional appointments in order to circumvent both the union contract and Civil Service rules, which dictate that appointments and promotions are to be made according to

merit and fitness, measured as far as practicable by competitive examination. She emphasizes that provisional appointments lasting over 12 months are illegal and improper to positions for which there exists a complete list of eligibles. Moreover, in 2008, the appellant states that she e-mailed her concerns about not receiving a Notification of Certification for Administrative Analyst 1 (PS5546K) to the Human Resource Manager, who dismissed her concerns. However, the appointing authority sent her another notice. The appellant contends the fact that she, the number one ranked person on the (PS5546K) eligible list, did not receive a certification notice until after she complained to this agency violates requirements listed in *N.J.A.C. 4A:4-4.2*.

The appellant also submits 2009 e-mails, inquiring about a change in job interview procedures. In that regard, she argues that the Human Resource Manager should provide employees with prior notice regarding changes to policies, and when questioned, should not refer employees to the DFD Director. Further, the appellant states that the DFD Director should not have scheduled a meeting which included a manager that she named in her EEO complaint, but rather, the DFD Director should have directed the Human Resource Manager to provide her with a copy of the policy. The appellant maintains that it was inappropriate for the DFD Director to tell her that she had to wait to obtain the information until her grievance hearing. Therefore, the appellant claims that the Human Resource Manager and the DFD Director subjected her to a hostile work environment.

In response, the appointing authority reiterates the findings of the investigation. It emphasizes that there was no "selection process" for the Administrative Analyst 1 position and the appointed eligible on the Supervisor, Standards and Procedures (PS5561K) eligible list was reachable for appointment. The appointing authority asserts that the appellant provided no specific evidence during the investigation that her non-appointments to these titles, as well as other titles in which she ranked number one on the eligible lists, were based on her age, religion, or marital affiliation. Rather, her allegations were "admittedly" "based on hearsay and assumption." The appellant also acknowledged in her grievances that her complaints involved contractual issues. Moreover, the appointing authority contends that an Asian American was appointed permanently from the Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list because he was serving provisionally and was the only employee who took the test.¹¹ It argues that the eligible's appointment was in accordance with *N.J.A.C. 4A:4-4.2(c)2ii*, which provides that "[w]hen fewer than three interested eligibles are certified and a provisional who is currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; or vacate the position/title." Further, the appointing authority states that the

¹¹ Agency records reveal that eight other employees filed applications for the Supervising Program Development Specialist, Management and Finance (PS5560K) examination. However, they were all found ineligible.

appellant did not apply for the (PS5560K) examination and admitted during the investigation that "to the best of her knowledge, she was not qualified or eligible to apply." It notes that the appellant did not specifically allege her failure to be appointed from the Contract Administrator 2 (PS0215K) eligible list during the investigation.

Moreover, the appointing authority emphasizes that DFD new hires and promotions adequately reflected the diversity of the division in terms of race and gender. It indicates that there is no statistical data on religion, and at the present time, there is no legal requirement to include religion in the statistical data. Additionally, the appointing authority submits that the charts that the appellant created regarding the religious affiliations of the employees was based on her conversations and observations in the workplace. Thus, the information is not necessarily factual. In addition, the appointing authority indicates that the appellant ranked third on the Supervising Program Support Specialist, Assistance Programs (PS8064K) eligible list and it used its discretion, pursuant to the "Rule of Three," to bypass her name on the July 23, 2013 certification for a lower-ranked candidate.

Additionally, the appointing authority maintains that the appellant's assignment to the Monmouth County Welfare Agency was due to operational needs and not for discriminatory reasons. Further, it notes that, in 2012, the appellant was asked whether she wanted a car assigned to her because she met the qualifications for one. However, she declined the car at that time and again declined when the State purchased additional cars. Shortly after her assignment to the Monmouth County Welfare Agency, she received a pool car. The appellant's assignment lasted only from December 2014 to March 2015. Since then, the appointing authority indicates that the appellant has been assigned to locations accessible by mass transit and has been driving a pool car with no complaints.

As to the timeliness of the investigation, the appointing authority "concedes that [the appellant's] complaints were not completed in a timely manner." However, the delay was due to staffing issues and a large volume of complaints to be processed. Nevertheless, the appointing authority maintains that the investigation of the appellant's complaints was "thorough, fair, and impartial." Furthermore, it asserts that the request for an in-person interview with the appellant to obtain specific information and clarify allegations was proper and in accordance with the Standard Operating Procedure (SOP) established by the Division of EEO/Affirmative Action (AA). While the SOP does not prohibit parties from submitting written responses, it recommends that the investigator meet with the parties individually to discuss the complaint and obtain other relevant information. Moreover, the appointing authority explains that the investigator is permitted to draft a statement of the interview, in the first person, and the interviewee reviews the statement and makes corrections at the time. This statement is signed and dated by the party. However, the appointing authority

maintains that the statement is part of the confidential investigation and the appellant is not entitled to a copy under the SOP.

The appellant did not provide a reply to the appointing authority's response to her appeal.

CONCLUSION

Initially, the appellant complains that the appointing authority did not investigate her complaints and issue a determination in a timely manner. The appellant's complaints were filed in 2009 and 2014, and a determination was not issued until September 22, 2015. Clearly, the appointing authority did not adhere to the regulatory time frame. In that regard, *N.J.A.C.* 4A:7-3.2(1)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C.* 4A:7-3.2(1)3 states that the time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of EEO/AA and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

Moreover, in numerous past decisions, the appointing authority has been advised to adhere to the time frame. In *In the Matter of L.C.* (MSB, decided September 6, 2006), the Merit System Board¹² (Board) advised the DHS to strictly comply with the time frames set forth in *N.J.A.C.* 4A:7-3.2(k) (now *N.J.A.C.* 4A:7-3.2(1)2) and that its failure to do so may result in fines or other appropriate actions. In *In the Matter of T.J.* (MSB, decided March 28, 2007), the Board again reminded the DHS to take steps to ensure that investigations are completed in the required time frame. Further, in *In the Matter of R.B.* (MSB, decided October 24, 2007), the Board advised the DHS that any future, egregious violations will result in fines or other appropriate action. See *N.J.A.C.* 4A:10-2.1. Thereafter, in *In the Matter of N.B., et al.* (MSB, decided August 27, 2008), *In the Matter of P.G.* (CSC, decided October 22, 2008), and *In the Matter of J.R.* (CSC, decided December 3, 2008), the determinations of the DHS were issued more than eight months, almost two years, and 10 months after the discrimination complaints were filed. The DHS provided explanations in *P.G.* and *J.R.*, *supra*, citing to staffing shortages and administrative reasons, which the Board found were unsatisfactory reasons for the two-year delay in *P.G.*'s case. Subsequently, the timeliness issue was raised again in *In the Matter of A.J.-S.* (CSC, decided January 27, 2010) and *In the Matter of P.G.* (CSC, decided

¹² On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission. In this decision, the former names will be used to refer to actions which took place prior to June 30, 2008.

October 6, 2010)¹³. In *A.J.-S.*, *supra*, the DHS explained that two of its investigators had recently left and it was not authorized to hire additional staff. It noted that it had over 16,000 employees, an inordinate amount of EEO complaints, and had presently only three investigators. In these cases, the Commission accepted reasons for the delay in issuing the determinations, but once again warned the DHS in *P.G.-2* that if it failed to comply with the regulatory time frame in the future and egregious violations occur, it may be subject to fines and penalties pursuant to *N.J.A.C. 4A:10-2.1(a)2*.

As set forth above, the appointing authority was advised as early as 2006, prior to the appellant's complaints in 2009, and also in 2010 that it must adhere to the regulatory time frame or it would be subject to fines. Further, in 2012 prior to the appellant's 2014 complaints, the DHS was given a final warning in *In the Matter of S.S.* (CSC Decided, September 19, 2012). In that case, the Commission stated, "[t]herefore, having reviewed this matter thoroughly and finding that the reason for the delay to be unacceptable and the DHS having been warned repeatedly to no avail, the Commission issues a **final warning** that, pursuant to *N.J.A.C. 4A:10-2.1(a)2* future, egregious, violations may result in fines up to \$10,000." (Emphasis added). Consequently, in *In the Matter of S.J.* (CSC, decided April 9, 2014), the Commission fined the DHS \$1,000 for its violation of *N.J.A.C. 4A:7-3.2(l)*, finding that the excessive seven-year delay in investigating the complaint compromised the thoroughness of the investigation. In the instant matter, the determination of the appellant's 2009 complaints was not issued until over six years later, despite repeated warnings to the DHS during that time. Additionally, even after it received a final warning in September 2012 and was fined in April 2014, the appointing authority did not timely conclude its review of the appellant's complaints until September 2015. Accordingly, the Commission finds the appointing authority's actions egregious in light of the State Policy requirements and the Commission's past warnings and fine. The appointing authority's excuse for the delay is not acceptable, especially given the aforementioned history. Therefore, the DHS is assessed a fine of \$2,500 for its violation of *N.J.A.C. 4A:7-3.2(l)*.

As stated by the Commission in *In the Matter of S.J.*, *supra*, the time frame set forth in *N.J.A.C. 4A:7-3.2(l)* is not for the administrative convenience of the appointing authority. Rather, this time frame is an important part of the State Policy. By requiring determinations to be issued at most within 180 days of a complaint, if a violation is found, action can be taken relatively quickly to help prevent future violations. Otherwise, an individual or an agency could be a repeat offender of the State Policy for years before any action is taken. Additionally, investigations can become compromised if not completed timely as witnesses may retire or be otherwise difficult to locate, memories fade, and evidence disappears

¹³ The P.G. referred to in this matter is not the same P.G. referred to previously in this paragraph and will be referred to as P.G.-2.

with the passage of time. Further, it is unfair to the complainant and respondent to have to wait years for a resolution. Thus, the Commission takes the timeliness of an investigation very seriously. It is noted that the Commission had previously directed the Division of EEO/AA to monitor all requests for extensions and ensure that all State appointing authorities, including the DHS, complete investigations of complaints and issue final letters of determination within the time frame set forth in *N.J.A.C. 4A:7-3.2(1)2*. See *R.B., N.B., P.G., J.R., A.J.-S., and S.S., supra*. The record in the instant matter does not evidence that extensions were given in this case. Regardless, the delay in this matter is egregious and an extension of over six years would certainly not have been approved given the regulatory time frame and the unacceptable excuse that the DHS has been utilizing for years. The Commission, therefore, reiterates the directive to the Division of EEO/AA and orders that it take any necessary action to assist the DHS and all State appointing authorities with remedying any current deficiency.

Prior to reviewing the merits of the appellant's appeal, other procedural issues must be addressed. The appellant questions the requirement of "verbal statements" or an in-person interview regarding her complaint, the "non-disclosure" of the names of the interviewees and the documents reviewed, and the appointing authority's refusal to release her interview statement. First, while in-person interviews are not specifically required under the State Policy, *N.J.A.C. 4A:7-3.1(d)* states that employees are expected to cooperate with the investigation of a complaint under the State Policy and authorizes an appointing authority to impose administrative and/or disciplinary action for those employees who fail to cooperate. Moreover, *N.J.A.C. 4A:7-3.2(h)* and *N.J.A.C. 4A:7-3.2(i)* provide in part that during the initial intake of a complaint, the EEO/AA Officer or authorized designee will obtain information regarding the complaint, and at his or her discretion, conduct an investigation of the alleged harassment or discrimination. Thus, when it is determined that interviews are appropriate in an investigation, employees are obligated to attend. An in-person interview allows a complainant to discuss and elaborate on his or her allegations. It also provides the investigator with the opportunity to clarify necessary information from the interviewee and engage in further discussion on an issue. Importantly, an in-person interview is a mechanism through which credibility of witnesses can be determined, which may not be readily apparent by written submissions. Therefore, the appellant's challenge of the requirement of "verbal statements" or an in-person interview is without merit.

Second, *N.J.A.C. 4A:7-3.1(j)* states in part that 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. As such, investigative information, such as documents and especially the names of witness, are usually not released. Nevertheless, 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 T.L.* (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 complaint, and the Commission is satisfied that the appellant has had a full opportunity to present evidence and arguments on her behalf and to question the thoroughness of the investigation. See *In the Matter of J.L., Department of Law and Public Safety*, Docket No. A-0702-03T5 (App. Div. October 17, 2005); *In the Matter of S.M.* (MSB, decided March 24, 2004). Additionally, the appellant does not present a sufficient reason as to why it would be necessary for her to know the identity of the witnesses. She also had the opportunity to reply to the appointing authority's response to her appeal, which included information as to what it reviewed. Accordingly, the Commission does not find it necessary to compel production of the investigative information in this matter.

Third, as to the appellant's interview statement, the Commission agrees with the appellant. A party's interview statement does not represent investigative information that should be kept confidential from the interviewee who has already seen it, nor is it privileged work product. The interview statement represents the personal statement of a party, which in the instant matter was given by the appellant to the investigator of her discrimination complaints. As reported by the appointing authority, the written statement is reviewed by the interviewee as to the accuracy of the statement. It is then signed and dated. It is noted that parties may be reminded that dissemination of the interview statement could be a breach of the confidentiality provision of the State Policy and could result in disciplinary action. See *N.J.A.C. 4A:7-3.1(j)* ("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.") Accordingly, it was inappropriate for the appointing authority to have denied the appellant's request for a copy of her interview statement. See *e.g., In the Matter of K.B.* (CSC, decided May 12, 2010). However, at this juncture, release of the interview statement serves no substantive purpose. The appellant does not provide a reason for its review and has submitted a very detailed description of her complaints. She also had an opportunity to challenge the appointing authority's determination and its response to her appeal.

It is noted that in June 2010, the Division of EEO/AA was advised that it would be inappropriate for "the EEO community" to ignore the *K.B.* decision and maintain a blanket prohibition on releasing such documents. It was conveyed that if the EEO community was to continue the use of interview statements as a tool in its investigation *and* the statements are reviewed by the party involved, they would not be considered confidential work product and their release to the party would not be prohibited. Therefore, it was advised that if the issue came before the Commission in a future appeal, the Commission could issue sanctions against the individual appointing authority for its disregard of a Commission decision. In the

present case, the Commission already fined the appointing authority. The Commission does not find it necessary to impose additional sanctions at this time. However, it warns the DHS to comply with the Commission's prior decision on this issue for any future requests or the DHS could face fines. Moreover, the Division of EEO/AA is directed to remind all appointing authorities of the *K.B.* decision, and if necessary, modify its SOP accordingly.

While procedural violations may have occurred in the appellant's case, such violations do not affect the merits of her case. There is no provision in the State Policy mandating that the appellant's complaints be upheld if procedural requirements are not fulfilled. *See e.g., In the Matter of K.K.* (MSB, decided January 25, 2006); *In the Matter of R.M.* (CSC, May 4, 2011). As such, the Commission must now evaluate the merits of the appellant's appeal.

It is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. This policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, advancement appointment, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions, and career development. *See N.J.A.C. 4A:7-3.1(a)3.* The protected categories include 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. *See N.J.A.C. 4A:7-3.1(a).* Additionally, 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. *See N.J.A.C. 4A:7-3.1(h).* Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4.*

The Commission has conducted a review of the record, and although the appellant may dispute the thoroughness of the investigation which took an inordinate amount of time to complete, the Commission finds that an adequate investigation of the appellant's discrimination complaints was conducted, which included interviews and a review of pertinent information, and no State Policy violation was found. In that regard, the appointing authority reviewed the various positions that the appellant set forth in her complaints and the applicable statistical data on hiring and promoting of employees and did not find that the appellant's non-appointment to the titles was discriminatory based on her age,

religion, or marital affiliation. It is noted that although the statistical data did not include information on religion, the appellant has failed to provide any evidence or a specific claim or incident to suggest that her non-appointments were based on her religion. Rather, she submits charts, purporting to list specific individuals' race, gender, age, and religion, and claims that the appointing authority favored promoting Caucasian, Christian, and Asian-American employees. However, the reliability of the appellant's information is questionable. The information that the appointing authority reviewed is clearly more reliable and it was determined that the hiring and promoting of individuals reflected the diversity of the division. It is emphasized that, in one example, the appointing authority appointed an eligible who is 64 years old, older than the appellant. Furthermore, the appellant may be the only Caucasian Jewish female married to an African-American man in her division. However, that alone does not demonstrate a nexus between the appellant's protected status and her failure to be appointed to the various positions to which she applied.

In that regard, the record reveals that, although the appellant was ranked number one on the Administrative Analyst 1 (PS5546K) eligible list, the Commission granted the appointing authority's request for a waiver of the appointment requirement and subsequently assessed the costs of the selection process. See *In the Matter of Administrative Analyst 1* (PS5546K), *supra*. The appellant also argues that the appointing authority filled a position two weeks prior to the issuance of the Supervisor, Standards and Procedures (PS5561K) eligible list, "contradicting Civil Service regulations." However, if the appointing authority actually did so, there was no eligible list in existence from which that appointment should have been made. Additionally, the appointment would be considered provisional and a permanent appointment would not be effective until the employee is appointed from a certification of the eligible list. Thus, there would not be a violation of Civil Service law or rules. It is noted that the appointing authority has the discretion to make provisional appointments when there is no existing eligible list. Further, the fact that a provisional appointment lasted more than 12 months, in violation of *N.J.S.A. 11A:4-13b*, does not in and of itself demonstrate that the appellant was discriminated against based on her protected status.

In addition, the third-ranked eligible who was appointed from the Supervisor, Standards and Procedures (PS5561K) eligible list was reachable for appointment. In that regard, *N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-7*, and *N.J.A.C. 4A:4-4.8(a)3* allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. In other words, the "Rule of Three" permits an appointing authority to use discretion in making appointments. As long as that discretion is utilized properly, an appointing authority's decision will not be overturned. In the appellant's case, the third-ranked eligible was a provisional employee. Provisional service of an eligible is a legitimate, non-discriminatory reason to appoint that eligible. See *e.g., In the Matter of Mahasen Adra-Halwani* (MSB, decided October 5, 2005) (Appointing

authority was not precluded from using education as one factor in making an appointment but can also consider performance during the interview process and provisional service in the title).

As to the Supervising Program Development Specialist, Management and Finance (PS5560K) eligible list, the appointing authority was within its discretion to have appointed the only eligible. See *N.J.A.C.* 4A:4-4.2(c)2ii. It also had the discretion of *not* appointing the appellant from the Contract Administrator 2 (PS0215K) eligible list as she was the only eligible. In that regard, *N.J.A.C.* 4A:4-4.2(c)2i states that “[w]hen fewer than three interested eligibles are certified and no provisional currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.” A review of the record indicates that the eligible appointed from the (PS5560K) eligible list had been serving provisionally. The appellant was not serving provisionally as a Contract Administrator 2. The appellant also challenges appointments on the Supervising Program Support Specialist, Assistance Programs (PS8064K) eligible list. However, the appointing authority used its discretion, pursuant to the “Rule of Three,” to bypass the appellant’s name on the July 23, 2013 certification. There is nothing in the record to demonstrate that her bypass was due to discriminatory reasons.

Similarly, there is insufficient evidence to show that the reason for the appellant’s assignment to the Monmouth County Welfare Agency was to harass or retaliate against her. Although the appellant suggests that there was not enough work to have her assigned to that location, the investigation revealed that her assignment was due to operational needs. Moreover, shortly after her assignment, she received a pool car. Additionally, the appellant alleges incidents between her and the DFD Human Resource Office, Human Resource Manager, Employee Relations Coordinator, and the DFD Director which she complains demonstrate “peculiar” behavior or a hostile work environment. However, it is noted that rude or unprofessional behavior cannot sustain a violation of the State Policy. See *In the Matter of A.M.* (MSB, decided June 8, 2005) and *In the Matter of B.H.* (MSB, decided February 26, 2003). In this regard, there is not one scintilla of evidence in the record that this perceived “peculiar” behavior was directly or indirectly related to the appellant’s status in any protected category. Further, reassignments are at the *discretion* of the head of the organizational unit. See *N.J.A.C.* 4A:407.2. In addition, these incidents allege complaints against management that are best addressed through the grievance procedures. As noted by the appointing authority, the appellant acknowledged that some of her complaints involved contractual issues. In that regard, the Commission does not have jurisdiction to enforce or interpret grievance procedures or other items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. See *In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank*

Jackson, Docket No. A-1980-99T1 (App. Div., May 8, 2001). The proper forum to bring such concerns is the Public Employment Relations Commission. See *N.J.S.A.* 34:13A-5.3 and *N.J.S.A.* 34:13A-5.4(c). Nonetheless, apart from mere allegations, there is nothing in the record to demonstrate that these incidents were motivated by a discriminatory reason in violation of the State Policy. Thus, the appellant's allegations are unsupported.

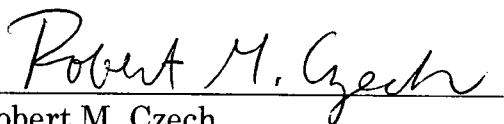
Therefore, under these circumstances, the appellant has failed to meet her burden of proof. See *N.J.A.C.* 4A:7-3.2(m)4. Accordingly, no basis exists to find a violation of the State Policy.

ORDER

Therefore, it is ordered that this appeal be denied. It is further ordered that the fine incurred for noncompliance of *N.J.A.C.* 4A:7-3.2(l) be assessed against the DHS in the amount of \$2,500, pursuant to *N.J.A.C.* 4A:10-2.1 and *N.J.S.A.* 11A:10-3, to be remitted within 30 days of the issuance of this decision. Additionally, it is ordered that the matter of untimely investigations and the release of personal statements be referred to the Division of EEO/AA for appropriate action in accordance 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 7TH DAY OF DECEMBER, 2016



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