



**STATE OF NEW JERSEY**

In the Matter of M.M.,  
Department of Human Services

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC Docket No. 2018-138

Discrimination Appeal

**ISSUED: MARCH 29, 2018 (JET)**

M.M., a Clinical Psychologist 2, Division of Mental Health Services with Ancora Psychiatric Hospital, Department of Human Services, represented by Robert Lytle, Esq., appeals the determination of the Assistant Commissioner, Office of Legal Affairs, Department of Human Services, which found sufficient evidence that she had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On May 4, 2017, J.U., an Administrator, Psychological Services, reported that the appellant left a voice mail message on his work telephone and she referred to an employee as a “bitch” in a conversation about work related matters. After an investigation was conducted, including a review of the recorded conversation the appellant left on J.U.’s telephone, the Office of Equal Employment Opportunity (EEO) substantiated that the appellant referred to an employee as a “bitch” in violation of the State Policy. Accordingly, the incident was referred for administrative action and the appellant was issued an official written reprimand. It is noted that, by letter dated October 26, 2017, staff from the Division of Appeals and Regulatory Affairs (DARA) notified the appellant that, pursuant to *N.J.A.C. 4A:7-3.2(n)*, her arguments pertaining to the State Policy violations may be appealed as a part of the disciplinary process using the procedures set forth in *N.J.A.C. 4A:2-2* and 3.

On appeal to the Civil Service Commission (Commission), the appellant asserts, among other things, that the EEO’s findings are inaccurate as she did not refer to another employee as a “bitch.” In addition, she argues that *N.J.A.C. 4A:7-*

3.2(n) is not mandatory. Rather, she contends that the rule uses permissive language, *i.e.*, “if disciplinary action has been recommended . . . the party(ies) charged may appeal using the procedures set forth in *N.J.A.C.* 4A:2-2 and 3.” As such, the appellant states that she has the option of having the instant matter decided either by the Commission or through the disciplinary process. The appellant adds that the disciplinary process does not allow representation by counsel, and as such, there is no way to confront witnesses or address the credibility of the opposing party.<sup>1</sup> Moreover, the appellant contends that she is experiencing an ongoing pattern of discrimination against her as evidenced by a prior decision issued by the Commission. *See In the Matter of M.M.* (CSC, decided June 26, 2013).

## CONCLUSION

*N.J.A.C.* 4A:7-3.2(n) provides that in a case where a violation of the State Policy has been substantiated, and no disciplinary action recommended, the party(ies) against whom the complaint was filed may appeal the determination to the Commission . . . within 20 days of receipt of the final letter of determination by the State agency head or designee. *N.J.A.C.* 4A:7-3.2(n)3 provides that in a case where a violation of the State Policy has been substantiated **and disciplinary action recommended**, the procedures set forth in *N.J.A.C.* 4A:2-2 and 3 for the appeal of disciplinary action may be followed.

In this matter, the appellant received an official written reprimand based on a finding that she had violated the State Policy. Thus, *N.J.A.C.* 4A:7-3.2(n)3 is applicable since a disciplinary action has been recommended. Contrary to the appellant’s arguments in this matter, *N.J.A.C.* 4A:7-3(n)3 is **not** permissive and does not allow her the option to waive the departmental hearing in favor of an appeal to the Commission pertaining to the State Policy violation. The Commission’s predecessor, the Merit System Board (MSB), has previously decided that the underlying discrimination matter cannot be reviewed by this agency when the disciplinary action is also the subject of the departmental hearing. *See In the Matter of Jamie Lemieux* (MSB, decided February 13, 2008). Moreover, the rule is clear that where a violation is substantiated, the avenues of appeal are based specifically on whether discipline is recommended. The “may” used in both *N.J.A.C.* 4A:7-3.2(n) and (n)3, are **not** to be interpreted as allowing choice of avenue, but rather indicate the actual avenue based on whether the condition, no discipline versus discipline, has been satisfied. Accordingly, the appellant does not have the right to file an appeal of the finding of discrimination against her.<sup>2</sup>

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<sup>1</sup> The Commission notes that discrimination appeals filed under the State Policy are decided on the written record.

<sup>2</sup> Although the EEO may recommend administrative action after substantiating the EEO violation, it does not have the authority to actually issue disciplinary action. Rather, it is the appointing authority that actually issues the disciplinary action if it determines that such action is appropriate. In other words, it is at the appointing authority’s discretion to issue the disciplinary action. When

The appellant's other arguments are unpersuasive. Whether major or minor discipline is recommended, an employee may be represented at the departmental hearing by an attorney where the full opportunity to present arguments and witnesses is afforded. *See N.J.A.C. 4A:2-2.6 and 4A:2-3.6(c).*<sup>3</sup> With regard to the appellant's argument pertaining to her prior discrimination appeal, she has presented no substantive evidence to show that the current matter is in any way connected to her prior discrimination appeal. As such, the record does not reflect that she has been subjected to a pattern of discrimination.

### ORDER

Therefore, it is ordered that this appeal be dismissed for lack of jurisdiction.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 27<sup>th</sup> DAY OF MARCH, 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

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disciplinary action is issued by the appointing authority, the appellant must appeal pursuant to the procedures set forth in *N.J.A.C. 4A:2-2* and 3.

<sup>3</sup> However, the Commission notes that for employees, such as the appellant, covered under the Communication Workers of America (CWA), which has opted out of the disciplinary process as regulated in Title 4A, Chapter 2, pursuant to *N.J.A.C. 4A:2-2.1(c)* and (d), it has no knowledge or jurisdiction over the rights afforded to such employees in departmental-level hearings. However, it is clear that, regardless of whether those rights or procedures are different than those in Chapter 2, an employee does not have the option to appeal to the Commission under *N.J.A.C. 4A:7-3.2* in an attempt to bypass the contractually agreed to disciplinary process.

c: M.M.  
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Records Center