



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of L.P., Department of
Transportation

CSC Docket No. 2015-2947

Discrimination Appeal

ISSUED: JUN 17 2015 (CSM)

L.P., a former Highway Construction and Bridge Repairer 2¹ with the Department of Transportation (DOT), appeals the attached determination of the Deputy Commissioner that the appellant did not present sufficient evidence to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant, an Asian American, filed a complaint with the DOT's Division of Civil Rights and Affirmative Action (DCR/AA) alleging that M.T., a Crew Supervisor, Highway Construction and Bridges, discriminated against him on the basis of race. Specifically, the appellant claimed that M.T. treated him differently by taking a shovel away from him and throwing it while saying "that's not the way you do it." The appellant also asserted that M.T. yelled at him for being in the wrong parking spot, made him pick up stones that spilled out of a front-end loader, and yelled at him not to put salt down while clearing snow as it may turn M.T.'s boots white. Based on these actions, the appellant claimed that M.T. denied him a promotion because he is Asian. The DCR/AA investigated the matter, which included a review of personnel records, discussions with Human Resources, and an interview with one witness and M.T., and was unable to substantiate the appellant's claims.

On appeal, the appellant asserts that interviewing one witness falls short of a thorough investigation and he argues that all employees who worked with him under M.T.'s supervision should have been interviewed. Further, he claims that he

¹ The appellant retired effective April 1, 2015.

was written up for safety concerns after M.T. made it known that he was not going to promote the appellant. In this regard, the appellant states that he passed the promotional examination for Highway Construction and Bridge Repairer 1 (PS6744T) and expressed interest in the position, but was not appointed. Additionally, the appellant argues that M.T. wrote him up for an incident involving a departmental vehicle, but the Accident Review Board determined that the matter was "non-reviewable." The appellant contends that M.T.'s hostile treatment toward him has caused him stress, pain, and suffering which resulted in his early retirement and he requests retroactive differential pay as a Highway Construction and Bridge Repairer 1 and compensation for his pain and suffering.

In response, the DCR/AA states that while the appellant asserts that its investigation was deficient as it only interviewed one witness, he did not offer any witnesses to the alleged incidents to clarify M.T.'s treatment toward him. In this regard, it emphasizes that it is up to a complainant to provide such evidence, including potential witnesses. Regardless, the investigation identified one witness who was unable to substantiate the appellant's claim. Moreover, several discussions took place with representatives from Human Resources in order to examine the claim that M.T. denied the appellant a promotion based on race. In this regard, the investigation found that the provisional appointee to the Highway Construction and Bridge Repairer 1 position had been returned to his permanent title and the appointing authority chose not to fill the position in accordance with *N.J.A.C. 4A:4-4.2(c)2(i)*. The DCR/AA also states that the appellant alleged that M.T. wrote him up for safety concerns after he made it known that he was not going to promote him. However, the investigation revealed that the certification notices were dated April 1, 2014, the appellant was advised by letter dated July 16, 2014 that the position was not going to be filled, but the incident for which he was written up occurred on March 19, 2014. As such, the timing of the documentation does not evidence that M.T. discriminated against the appellant.

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. Further, *N.J.A.C. 4A:7-3.1(c)* provides that it is a violation of the State Policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment. Additionally, the appellant shall have the burden of proof in all discrimination appeals. See *N.J.A.C. 4A:7-3.2(m)(3)*.

The Commission has conducted a review of the record and finds that the appellant has not established that he was discriminated against based on his race. It is un rebutted by the appellant that he did not specify any witnesses for the DCR/AA to interview regarding his allegations against M.T. Rather, the record shows that the DCR/AA interviewed one witness who was unable to corroborate the appellant's allegations and had multiple discussions with Human Resources regarding the certification of the Highway Construction and Bridge Repairer 1 eligible list. Thus, while he argues that interviewing one witness falls short of a thorough investigation, the appellant did not provide the investigator with the names of any witnesses to the alleged incidents who could provide the investigator with relevant information. Additionally, other than stating in his appeal submissions that all employees who worked with him should be interviewed, the appellant has not provided the names of anyone in his appeal submission who he claims witnessed the alleged incidents.

In this case, the DCR/AA investigated the matter based on the information provided by the appellant and properly focused on the essential basis of the appellant's complaint – the fact that he was not appointed from a certification. In this regard, it must be underscored that the appellant did not appeal his non-appointment from the Highway Construction and Bridge Repairer 1 eligible list and *N.J.A.C. 4A:7-3.2(m)1* requires that employees filing State Policy appeals which raise issues for which there is another specific appeal procedure to utilize those procedures. Regardless, notwithstanding the fact that the appellant did not provide the names of any witnesses, the DCR/AA's review of the promotional situation resulted in it determining there was at least one witness and that witness was interviewed. Further, as noted by the DCR/AA, the timing of when M.T. wrote him up for safety concerns occurred weeks before the certification notice was issued to the appellant. Thus, M.T. could not have written the appellant up with the intention of not promoting him from a certification that had not yet been issued. Therefore, other than his mere allegations, the appellant has not demonstrated that M.T. violated the State Policy.

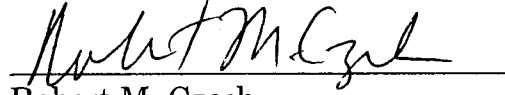
Accordingly, the Commission finds that the DCR/AA's investigation was thorough and impartial, and the record supports a finding that there was no violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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 15TH DAY OF JULY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: L.P.
Linda Legge
Mamta Patel
Joseph Gambino



State of New Jersey

DEPARTMENT OF TRANSPORTATION

P.O. BOX 600

TRENTON, NJ 08625-0600

CHRIS CHRISTIE

Governor

KIM GUADAGNO

Lt. Governor

JAMIE FOX

Commissioner

April 21, 2015

REGULAR AND CERTIFIED MAIL

Mr. L [REDACTED]

Re: EEO Discrimination Complaint

Dear Mr. P [REDACTED]:

The Department of Transportation's Division of Civil Rights and Affirmative Action investigated your allegations that M [REDACTED], Crew Supervisor subjected you to differential treatment and denied you a promotion to Highway Construction and Bridge Repairer 1 ("Bridge Repairer 1") based on race in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace ("State Policy").

In your complaint you alleged T [REDACTED] treats you differently than he treats other employees and his behavior towards you is "humiliating." As an example, you said on one occasion T [REDACTED] took a shovel away from you as he was using it and threw it while saying, "that's not the way you do it." You said that on another occasion T [REDACTED] "yelled" at you about being in the wrong parking spot. After chastising you about the parking spot, you said T [REDACTED] took over the stone-filled loader from an employee who was using it at the time and spilled the stones out and then ordered you to "get out there and pick them (stones) up, one at the time." You said no one was around at the time to witness this incident.

In describing another incident regarding T [REDACTED], you said last winter, you were shoveling snow and cleared the front door and put salt down and Thomas came out and yelled at you saying, "don't put salt out there, I have \$700 boots on and they'll turn

white." You said, everyone heard him and you were humiliated; however, you were only trying to do what you thought was best by spreading salt on the snow and ice outside of the office door. You said, "Other employees are not treated like this by T; and he drinks coffee and smokes with them."

You explained that you decided to file a discrimination complaint when you heard T was not going to promote you to Bridge Repairer 1 title despite being certified on the list and ranked number.

Finally, you alleged that T treats you differently and you were denied the promotion because you are Asian and more or less a submissive person that does not talk back or challenge T.

The Division of Civil Rights and Affirmative Action conducted a thorough investigation, which included a review of personnel records, discussions with Human Resources and an interview with one witness and the respondent.

The investigation was unable to substantiate your allegations of discrimination and that you were denied a promotion based on race.

It is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based on any of the protected categories, including race. The State Policy applies to conduct that occurs in the workplace and conduct that occurs at any location which can reasonably be regarded as an extension of the workplace. In addition, the State Policy covers all employment practices such as hiring, training, promoting, disciplining and terminating. Therefore, denying an employee a promotion based on race is a violation of the State Policy.

You alleged that you were treated differently and less favorably by T due to race (Asian). You described several incidents of T's mistreatment towards you. However, you said you did not decide to file a discrimination complaint until you discovered T was not going to promote you to the Bridge Repairer 1 job despite being ranked number one on the certification list.

A review of the Civil Service Promotional List for Bridge Repairer 1 confirms that you passed the examination, were on the list and expressed an interest in an appointment. You were the only interested eligible for Warren County.

In accordance with the Civil Service Commission regulation, New Jersey Administrative Code (NJAC), Title 4A:4-4.2 1(c), "An appointing authority shall be entitled to a complete certification for consideration in making a permanent

appointment.” With respect to incomplete lists Title 4A:4-4.2 2i states, “When 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.”

Accordingly, Civil Service Promotional lists, with less than three, interested eligibles are considered incomplete lists and are not required to be certified or used by the appointing authority for appointment purposes. The discretion to use the list is left up to the appointing authority (NJDOT). However, since you were the only interested eligible on the promotional list for Bridge Repairer 1 in Warren County – Region North, T [REDACTED] was not obligated to use this list; and instead requested that more names be added through an examination process in order to make a more competitive selection for the job. This was an administrative decision and it is not possible to establish that the decision to not certify this incomplete list was on the pretext that you, the incumbent on the list, were Asian.

Finally in accordance with Title 4A:4-7.1 (b)2, “If an employee does not successfully complete the examination or working test period, “the recipient organizational unit shall return the employee back to his or her permanent title or job...” In this particular situation, the provisional appointee, W [REDACTED] R [REDACTED] did not pass the Civil Service exam; therefore the position was vacated and R [REDACTED] was returned to his last permanent title, Bridge Repairer 2 with the corresponding reduction in salary.

During the interview with T [REDACTED] he expressed concerns that you may not be ready for the Bridge Repairer 1 job, as you did not always make safety your priority. In fact, T [REDACTED] described several incidents where you did not demonstrate safety, which put other employees at risk of injury and resulted in damaging department equipment. T [REDACTED] said he made you aware of these safety matters and noted them in your Performance Assessment Review (PAR) document.

Finally, while T [REDACTED] said he did not recall the specific incidents described by you in your claims that he treats you differently, he acknowledged that his voice gets loud when employees are not performing their work properly and they may perceive it as yelling. He acknowledged that you were subjected to his raised voice, but noted other employees were exposed to his voice raising too. He also suggested that he may have raised his voice to you when you were spreading salt around the building and in situations where he was trying to get you to follow safety rules.

You were unable to identify specific witnesses to the incidents you presented as support that T█████ treats you differently and less favorably because of your race. Nevertheless one witness was interviewed and was unable to support your claims; and when asked, this witness did not suggest or believe your race played into T█████' decision not to promote you to Bridge Repairer 1. Therefore, in the absence of independent, corroborating witnesses to verify your allegations of differential treatment, this investigation is unable to determine that T█████' actions violated the State Policy. Furthermore, no credible evidence of race discrimination surfaced as the reason you were not promoted. Moreover, T█████ was able to provide a legitimate business reason for not promoting you, which was due primarily to safety concerns.

While this investigation did not uncover race discrimination, this office made recommendations for management's consideration in addressing other workplace matters raised during this examination.


If you disagree with this determination, pursuant to N.J.A.C. 4A:7-3.2, you have the right to appeal this decision. You must submit a written appeal to the New Jersey Civil Service Commission, Division of Merit System Practices and Labor Relations, Written Record Appeals Unit, P. O. Box 312, Trenton, NJ 08625-0312, postmarked or delivered within 20 days of your receipt of this determination. Your appeal must include a copy of this determination, the reason for the appeal and the specific relief requested. Be advised that effective July 1, 2010, there is a \$20 fee for appeals. Please include a check or money order along with your appeal, payable to NJCSC. Persons receiving public assistance and those qualifying for NJCSC Veterans Preference are exempt from this fee.

Please be advised that the State Policy prohibits retaliation against anyone who alleges that she or he was the victim of discrimination or harassment, provides information in the course of an investigation into claims of discrimination or harassment in the workplace or opposes a discriminatory practice. Please immediately contact the Division of Civil Rights and Affirmative Action at 609-530-3009, if you believe that you have been the victim of retaliation

Finally, we remind you that all aspects of EEO complaints, investigations, and determinations are considered highly sensitive and must be kept confidential. You should not discuss this matter, including its outcome, with anyone who does not have a business reason to be involved in this matter.

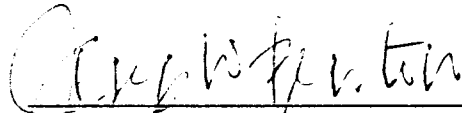
If you have any questions or concerns, please do not hesitate to contact the Division of Civil Rights and Affirmative Action at 609-530-3009.

Sincerely,



Linda Legge, Executive Director
Division of Civil Rights and Affirmative Action

In Concurrence,



Joseph Bertoni, Deputy Commissioner

c: Mamta Patel, Director, Division of EEO/AA - Civil Service Commission
Andrew Tunnard, Assistant Commissioner

