B-79

STATE OF NEW JERSEY

CIVIL SERVICE COMMISSION

In the Matter of F.P.,
Department of Corrections

CSC Docket No. 2016-155

Court Remand

ISSUED: JUL 17 2015 (DASV)

The Superior Court of New Jersey, Appellate Division, vacated the Civil Service Commission's (Commission) decision to deny F.P.'s appeal of the determination of the Director, Equal Employment Division (EED), Department of Corrections, stating that there was probable cause to substantiate a finding that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). The Court remanded the matter for a hearing at the Office of Administrative Law (OAL). *See In the Matter of F.P., Department of Corrections,* Docket No. A-1368-13T4 (App. Div. June 10, 2015). The court did not retain jurisdiction. Copies of the Appellate Division's decision and the Commission's decision, *In the Matter of F.P.* (CSC, decided October 2, 2013), are attached hereto and incorporated herein.

The facts of this matter are thoroughly discussed in the attached decisions. After an investigation by the EED, two violations of the State Policy were sustained against F.P., who is a former unclassified Assistant Superintendent 1, Corrections with Northern State Prison, Department of Corrections.[1] As a result, F.P. was suspended for 40 working days, demoted,[2] reassigned to another facility, removed as the EED liaison, and required to attend training. V.C., a female and a former

[1] The appellant retired from State service effective March 1, 2013. During the time of the EED matter and his suspension, he was serving in the unclassified title of Assistant Superintendent 1, Corrections and was designated as the EED Liaison with Northern State Prison. Effective December 15, 2012, he was returned to his career service title of Executive Assistant 2 and assigned to South Woods State Prison.

[2] The appellant's demotion was actually a return to his career service title of Executive Assistant 2.

Quality Assurance Specialist, Health Services,[3] had filed a sexual harassment complaint against F.P. On appeal to the Commission, F.P. challenged several findings of the investigation.[4] However, the Commission denied the appeal upon a review of the written record, finding that the investigation was thorough and impartial. The Commission also did not grant F.P.'s request for access to the investigative material in light of the detailed submissions received from the parties. Thereafter, F.P. appealed the decision to the Appellate Division, arguing that he was deprived of due process because he was not allowed discovery and was denied an evidentiary hearing. The Court found that a hearing was necessary as a matter of due process, since there were crucial, disputed issues of material fact that could not be determined on the written record. Accordingly, the Court reversed the decision of the Commission and remanded the matter to the Commission for a hearing.

CONCLUSION

Discrimination appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). In the prior matter, the Commission denied the appellant's appeal upon a review of the written record, finding that a sufficient basis existed in the record to uphold the EED's determination that he violated the State Policy. However, the Appellate Division has found that disputed issues of material fact exist which cannot be determined on the written record, thereby requiring a hearing in the matter where an Administrative Law Judge may evaluate evidence and assess the credibility of the parties. Therefore, in accordance with the Appellate Division decision, the Commission grants a hearing at the OAL.

ORDER

Therefore, it is ordered that this matter be referred to the OAL for a hearing as a contested case.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JULY, 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

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[3] V.C. resigned effective August 21, 2014.

[4] The appellant only appealed the State Policy violation regarding V.C. and did not appeal the other violation, which involved a different employee.

Inquiries
and
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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1368-13T4

IN THE MATTER OF F.P.,
DEPARTMENT OF CORRECTIONS.

Argued March 11, 2015 – Decided June 10, 2015

Before Judges Alvarez, Waugh, and Maven.

On appeal from the New Jersey Civil Service Commission.

David J. DeFillippo argued the cause for appellant F.P. (Detzky, Hunter & DeFillippo, LLC, attorneys; Mr. DeFillippo, of counsel and on the briefs).

Pamela N. Ullman, Deputy Attorney General, argued the cause for respondents New Jersey Civil Service Commission and Department of Corrections (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Ullman, on the brief).

PER CURIAM

Petitioner F.P. (Fred)[1] appeals the October 3, 2013 final administrative agency decision of the New Jersey Civil Service Commission (Commission) upholding his suspension and demotion by the New Jersey Department of Corrections (Department). We reverse and remand for a hearing.

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[1] We use pseudonyms for the sake of confidentiality.

I.

We discern the following facts and procedural history from the record on appeal.

In 2012, Fred was employed in the unclassified title of Assistant Superintendent 1, Corrections, at Northern State Prison (Northern State). V.C. (Cook) was employed as a Quality Assurance Specialist at Northern State. On June 8, Cook filed a sexual harassment complaint against Fred with the Department's Equal Employment Division (Division). She complained about Fred's continuous sexual advances to her, which included asking her to be intimate with him. She also alleged that he referred to her as being "crazy."

According to Cook's statements during a Division interview, Fred had been obnoxious to her at a meeting in February. Approximately a week later, Fred came to her office and wanted to settle their differences. Cook alleged that Fred asked her out and told her "you are a beautiful person, look at you, you have a beautiful body, I just want to be intimate with you." Cook told him to leave her office. When asked to respond to that allegation, Fred replied: "I have no idea what she is talking about."

Cook also alleged that, on several occasions, Fred asked her out, told her that she was "beautiful inside and outside,"

that he was her "friend," and that he wanted to "be with her intimately." Fred denied those allegations, except for acknowledging that he and Cook had gone out for a drink one day after work in 2011.

Cook further alleged that Fred was unprofessional toward female employees, specifically by shouting at them, raising his voice around other staff, and pointing his finger in their faces. She asserted that he did not subject male employees to this behavior. Fred denied the allegations stating, "I have no idea what she is speaking about. I totally deny it. I don't talk to anyone that way."

When shown post-it notes submitted by Cook,[2] Fred acknowledged that he wrote them and left them on her desk. He also acknowledged that he left Cook little gifts on her desk, such as an Easter Bunny and a Mickey Mouse. Fred explained, however, that he also gave souvenirs to other colleagues, both female and male.

According to Cook, she had complained about the notes the prior year and had the locks to her office changed, but the notes continued. Fred acknowledged that he "had left something" in Cook's office, explaining that "[a]s an Administrator, I have

[2] The post-it notes are not part of the record, and were not specifically listed on the Commission's statement of the record on appeal.

a key to everyone's [o]ffice." He also asserted that she did not "own that [o]ffice" and that "[a]s an Administrator, [he had] the right to enter any [o]ffice at any time."

Fred also denied Cook's allegation that he referred to her as "crazy" in the presence of other staff members on two occasions. He told the interviewer that Cook

> suffers from a serious medical illness. She often came to work in pain but was able to do her work. I often sympathized with her because I saw the pain she was in[,] and she's a hard worker. I often felt sorry for her. It is my understanding from her, that her illness was not curable and progressively would get worse. I felt sorry for her. She is a nice person. I thought it was nice to leave her notes to make her feel good. As I indicated, I travel often and always bring back souvenirs to many employees. [Cook] on one occasion saw that[,] by me using soap in the men's room[,] caused my face to blush; therefore she brought me[,] with her own money, special soap, body lotion and something else. We have always been good friends and nothing more. I firmly believe this is coming about only at this time because [Cook] is mad at me for changing her meeting on May 17, 2012 from 11:00 a.m. to 11:30 a.m. This meeting was changed by me under the direction of Mr. Lagana[,] our Administrator[,] due to the graduation and the busy schedule on that day. I have in my possession, three statements from Medical staff that witnessed the verbal interaction between me and [Cook].

On October 2, 2012, the Division substantiated two violations of the Department's policy prohibiting discrimination

in the workplace: (1) N.J.A.C. 4A:2-2.3(a)(12) (violating the policy) and (2) N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming an employee). The decision was based on the record of the investigation, without a hearing. As a result, Fred was suspended without pay for forty working days, demoted and reassigned to another facility, and required to attend training.[3]

Fred appealed to the Commission. He submitted a copy of an email exchange with Cook, dated May 16, to support his position that Cook was unhappy about his changing the time of a meeting earlier on that day. It read, in part, as follows:

> [12:19 p.m.]
> [Fred],
> There were not [sic] allegations and my description of your work ethics are FACTS as documented furthermore, I CAN AND WILL produce valid documentation to substantiate and solidify that you are indeed un-professional.
>
> You continue to disrespect me and disregard my position in NJDOC while exalting your position and power.
>
> . . . .
>
> [12:00 p.m.]
> [Cook],
> I would appreciate, in the future, before you make false, baseless allegations regarding my professionalism, my work ethics and myself to other NJDOC employees that include my immediate supervisors, that you

[3] Fred subsequently retired.

> inquiry [sic] as to the FACTS as they relate to your allegations.
>
> . . . .
>
> [11:20 a.m.]
> Mr Lagana,
> This is the first time I have brought this to your attention but it is certainly not the first time [Fred] has over stepped his boundaries.
>
> [Fred] met with the Medical Management Team some time ago and proceeded to change the time of tomorrow"s [sic] Bi-monthly State from 11:00 Am to 11:30 Am. He was kind enough to inform me of such a change a few minutes ago.
>
> I would hate to see this pattern continue. I will not continue to be the subject of such gross disrespect in the work place provided to me while being employed by NJDOC.

Fred submitted written statements from three other employees who witnessed the verbal exchange between Cook and Fred at that meeting. They reported that Cook expressed her "dissatisfaction" or "unhappiness" about the change in the meeting schedule.

Fred also submitted statements attesting to his character and workplace conduct from three coworkers: Marvin Blevins, Diane Doran, and Tanya Everette. Blevins stated that he was "certain that the allegations of [s]exual [h]arassment . . . are completely falsified," because he had known Fred for twenty-five years and Cook had accepted Fred's invitation for a drink.

He also noted that Fred "always gave gifts to many co-workers." Doran stated that Fred had given her gifts, and had also left notes on her desk after she had left for the day. She also noted that she found the sexual harassment allegations "impossible to believe due to the fact that [Cook] and [Fred] went out for a drink." Everette, who worked in the Human Resources Department, reported that "[a]s a female employee, these alleged behaviors have never been directed at me. More significantly, these alleged behaviors have NEVER been report[ed] to ANY Human Resources [personnel]." She also noted that she and other coworkers have received gifts from Fred.

On October 3, 2013, the Commission sustained the disciplinary actions taken by the Department, stating:

> [T]he Commission has conducted a review of the record and finds that the [Division] conducted a thorough investigation. Specifically, it interviewed the relevant parties in this matter in investigating the complaint filed by [Cook]. The [Division] substantiated the allegations based on interviews with witnesses, that [Fred] entered [Cook]'s office on a regular basis and made comments about her appearance; [Fred] once entered [Cook]'s office and commented on how nice her legs looked; [Cook] received unsigned notes in her office; [Cook] often complained about [Fred] asking her out, making comments about her appearance, and asking her to be intimate with him; and the secretary for the Administrator confirmed that [Fred] would ask for the keys to [Cook]'s locked office, even after the locks had been changed, and

> he often asked her the whereabouts of [Cook], who did not report to him. The [Division] noted that although there were a number of witnesses who were not eyewitnesses, their recollections of the statements reported by [Cook] were all consistent.
>
> On appeal, [Fred] merely contends that the allegations against him were false and uncorroborated, as well as filed in retaliation for an incident that happened at a meeting on May 17, 2012. [Fred] also attempts to explain other behaviors, such as leaving a gift, leaving notes in [Cook]'s office, and referring to [Cook] as crazy as saying it does not constitute sexual harassment under the laws of the State. However, [Fred's] allegation of retaliation based on a meeting [is] not persuasive as the [Division] has indicated that, based on its investigation, there was sufficient evidence to indicate a violation of the State [p]olicy. . . .
>
> . . . Indeed, sexual comments and gestures can and do constitute a violation of the State [p]olicy and it is emphasized that such conduct need not rise to the level of "severe and pervasive" in order to constitute such a violation. See In the Matter of Iraida Afanador, (MSB, decided January 31, 2007).
>
> [(Footnote omitted).]

In addition, the Commission expressed "serious concern" regarding Fred's solicitation of witness statements as part of his appeal, contending that it violated the confidentiality provision of N.J.A.C. 4A:7-3.1(j). The Commission noted that, instead of approaching the witnesses during the appeal,

> [t]he proper course of action would have been for [Fred] to provide potential witness names during the investigation. In this case, the Commission has significant concerns that the witness statements that [Fred] provides were equivalent to an impermissible interrogation of potential witnesses in violation of the State [p]olicy. . . . [T]he statements that [Fred] obtained contained specific information about his relationship with [Cook] and her allegations that clearly could have undermined the confidentiality of the investigation. . . . [T]he Commission finds that [Fred] breached the confidentiality provision of the State [p]olicy. . . .
>
> . . . [A]fter its review of the statements, the Commission does not find that the information contained in the statements provides a basis to reverse the findings of the [Division's] investigations. For example, it is irrelevant that [Fred] never sexually harassed one witness or that she is not aware of any other allegations against him, as one instance of sexual harassment can be a violation of the State [p]olicy. Accordingly, based on the foregoing, the Commission finds that the [Division]'s investigation was thorough and impartial, and a sufficient basis exists to find violations of the State [p]olicy.

This appeal followed.

II.

On appeal, Fred argues that he was deprived of due process because he was not allowed discovery and was denied an evidentiary hearing. He further argues that the Commission's decision was arbitrary, capricious, and not supported by facts in the record.

A.

Before turning to our consideration of the issues raised by Fred, we outline the law governing our decision. Our scope of review of an administrative agency's final determination is limited. In re Carter, 191 N.J. 474, 482 (2007). We accord a "strong presumption of reasonableness" to the agency's exercise of its statutorily delegated responsibilities. City of Newark v. Natural Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). The burden of showing that the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

The reviewing court "should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009).

Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, "[a]n administrative agency's

final quasi-judicial decision will be sustained." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.) (citing Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)), certif. denied, 176 N.J. 281 (2003).

In reviewing administrative adjudications, an appellate court must undertake a "careful and principled consideration of the agency record and findings." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985) (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). If, however, our review of the record leads us to conclude that the agency's finding is clearly erroneous, the

decision is not entitled to judicial deference and must be set aside. L.M. v. Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995). We may not simply rubber-stamp an agency's decision. In re Taylor, 158 N.J. 644, 657 (1999).

Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower, supra, 64 N.J. at 93, if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result," Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) (citing Clowes, supra, 109 N.J. at 587).

The State's policy concerning discrimination in its workplace was established by the former Merit System Board in 2002 through its adoption of Amendments and Additions to N.J.A.C. 4A:7. 34 N.J.R. 261(a). N.J.A.C. 4A:7-3.1(a) provides that the State "is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment," including discrimination or harassment based on sex or gender. Because it is "a zero tolerance policy," "the State and its agencies reserve the right to take either disciplinary action, if

appropriate, or other corrective action, to address any unacceptable conduct" in violation of the policy. Ibid.

The general procedures to be followed by a State agency in the event of a complaint are outlined in N.J.A.C. 4A:7-3.2, including the following:

> (i) At the EEO/AA[4] Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.
>
> (j) An investigatory report will be prepared by the EEO/AA Officer or his or her designee when the investigation is completed. The report will include, at a minimum:
>
> 1. A summary of the complaint;
>
> 2. A summary of the parties' positions;
>
> 3. A summary of the facts developed [through] the investigation; and
>
> 4. An analysis of the allegations and the facts. The investigatory report will be submitted to (State agency head) who will issue a final letter of determination to the parties.
>
> (k) 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's Policy Prohibiting Discrimination in the

[4] The EEO/AA is the Division of Equal Employment Opportunity and Affirmative Action. N.J.A.C. 4A:7-2.1.

Workplace 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.

(l) The (State agency head or designee) will issue a final letter of determination to both the complainant(s) and the person(s) against whom the complaint was filed, setting forth the results of the investigation and the right of appeal to the Merit System Board as set forth in subsection (m) and (n) below. To the extent possible, the privacy of all parties involved in the process shall be maintained in the final letter of determination. The Division of EEO/AA, Civil Service Commission, shall be furnished with a copy of the final letter of determination.

1. The letter shall include, at a minimum:

i. A brief summary of the parties' positions;

ii. A brief summary of the facts developed during the investigation; and

iii. An explanation of the determination, which shall include whether:

(1) The allegations were either substantiated or not substantiated; and

(2) A violation of the Policy Prohibiting Discrimination in the Workplace did or did not occur.

2. 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 referred to in (h) above is completed.
>
> 3. 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.
>
> (m) A complainant who is in the career, unclassified or senior executive service, or who is an applicant for employment, who disagrees with the determination of the (State agency head or designee), may submit a written appeal, within twenty days of the receipt of the final letter of determination from the (State agency head or designee), to the Civil Service Commission . . . .

If an appeal is made from the agency head to the Commission, the appellant bears the burden of proof on appeal. N.J.A.C. 4A:7-3.2(m)(4). The Commission decides the appeal on "a review of the written record, or such other proceeding as it deems appropriate. See N.J.A.C. 4A:2-1.1(d)." N.J.A.C. 4A:7-3.2(m)(3). N.J.A.C. 4A:2-1.1(d) provides that, "[e]xcept where a hearing is required by law, this chapter or [regulations concerning layoffs], or where the Civil Service Commission finds

that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record."

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In broader language, our State Constitution declares that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Although this provision of our State Constitution does not actually include the phrase "due process," it is well understood that, like the Fourteenth Amendment, it "protects against injustice and, to that extent, protects 'values like those encompassed by the principle[] of due process.'" Doe v. Poritz, 142 N.J. 1, 99 (1995) (alteration in original) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)).

Notice and the opportunity to be heard are "[t]he minimum requirements of due process." U.S. v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987) (citing Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). In Sabia v. Elizabeth, 132

N.J. Super. 6, 14 (App. Div. 1974), certif. denied, 67 N.J. 97 (1975), we held that a disciplinary proceeding for a public employee is

> in no way a criminal or quasi-criminal proceeding and, consequently, respondents in such a proceeding do not come within the shield of the various constitutional guarantees accorded persons accused of a crime. Departmental disciplinary proceedings are civil in nature; requirements of due process are satisfied so long as proceedings are conducted with fundamental fairness, including adequate procedural safeguards.

Consequently, "a hearing on a record consisting only of written documents is appropriate where there is no genuine issue as to any material fact." Fraternal Order of Police Lodge # 1 Camden v. City of Camden Police Dep't., 368 N.J. Super. 56, 62 (Law Div. 2003) (emphasis added).

B.

Based upon the legal principles outlined above, we have determined that a remand is required. Our reading of the record convinces us that there are crucial, disputed issues of material fact that cannot be determined on the papers, making a hearing necessary as a matter of due process, ibid., and the Commission's own regulations, N.J.A.C. 4A:2-1.1(d). To the extent the Commission determined that a hearing was unnecessary,

we find that decision arbitrary, capricious, and unsupported by the record on appeal.

It is clear from the limited record before us that most, if not all, of Cook's most damaging factual assertions were directly disputed by Fred. For example, he denied that he expressed a desire for intimacy with her. We fail to see how the truth of those very crucial, competing factual assertions can, consistent with basic due process, be decided on the papers.

In addition, there were undisputed facts whose import was disputed. By way of example, Cook alleged that Fred left post-it notes and presents on her desk, an assertion Fred did not deny. However, he explained that he had left presents for other employees, both male and female, and had left post-it notes for other female employees, assertions for which there is some support in the record. If true, Fred's explanation could be found to undercut the force of Cook's implicit allegation that she was the subject of disparate treatment based on gender and Fred's interest in dating her.

We also have concerns about the record on which the Department and Commission made their determinations. Although we have the summary of the Division's interview with Fred, which also reflects assertions made by Cook, it appears that the

Department's decision was based on a larger record. We find it troubling that the record on which the Department's decision was based is not before us, and was apparently not before the Commission. And, if the decision was based only on a summary of the investigation, we find that troubling in itself.

While we understand the need for confidentiality, the requirements of basic procedural fairness require that appellate review be based on the same record as the initial decision, with appropriate safeguards to preserve required confidentiality. Indeed, the Commission's regulations themselves recognize that confidentiality is not absolute. N.J.A.C. 4A:7-3.1(j) ("All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved." (Emphasis added)).

In addition, it is difficult to defend against allegations of discrimination in the workplace, which are serious and understandably taken seriously by the State, without knowing the facts and evidence on which the allegations and any ultimate findings are based. In that regard, we note that Fred was suspended without pay for forty days and demoted as a result of the Department's decision, which is considered "major discipline," under N.J.A.C. 4A:2-2.2(a). While a State employee subject to major discipline is not entitled to all the rights

accorded a criminal defendant, he or she is entitled to proceedings "conducted with fundamental fairness, including adequate procedural safeguards." Sabia, supra, 132 N.J. Super. at 14. If the provision of due process requires a hearing under some circumstances, any cost or inconvenience "must be borne by the public in a constitutionally governed society." In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 165-66 (App. Div. 1998).

We also note that, while the Department based its disciplinary action on the results of the investigation, N.J.A.C. 4A:7-3.1(g)(3) provides only that the investigation results should be the basis for remedial action in the workplace and the initiation of disciplinary action. Consequently, the Commission must also consider whether the Department ignored the requirements of N.J.A.C. 4A:7-3.1(g)(3) by basing its disciplinary action solely on the investigation report.

For these reasons, we vacate the Commission's decision and remand for further consideration of Fred's request for discovery and a hearing, consistent with the due process principles outlined above.

Reversed and remanded.

STATE OF NEW JERSEY

In the Matter of F.P., Department of Corrections	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2013-1515	:	Discrimination Appeal

ISSUED: OCT 0 3 2013 (DCJ)

F.P., a former Executive Assistant 2 with South Woods State Prison, Department of Corrections,[1] appeals the attached determination of the Director, Equal Employment Division (EED), stating that there was probable cause to substantiate a finding that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

In letters dated October 3, 2012 (attached) and October 11, 2012, the Department of Corrections informed the appellant that two violations of the State Policy had been substantiated against him, and as a result, it was determined that he would be suspended for 40 working days, reassigned to another facility, removed as the EED liaison, and sent to EED and professional training. Specifically, the EED determined that the sexual harassment complaint of V.C., a Quality Assurance Specialist, Health Services, was substantiated.[2]

On appeal to the Civil Service Commission (Commission), the appellant vehemently denies the allegations of sexual harassment that have been levied against him and seeks a hearing in the matter. With regard to the allegation that he said to V.C. "you have a beautiful body," "I want to be with you, I want to go out

[1] Official records indicate that the appellant retired from State service effective March 1, 2013. During the time of the investigation, he was serving in the unclassified title of Assistant Superintendent 1, Corrections and was designated as the EED Liaison with Northern State Prison.
[2] It is noted that the appellant chose not to appeal his other violation of the State Policy, which involved a different employee.

with you," and "I want to be intimate with you," the appellant argues that he never made such statements or any statements that could be construed to convey those meanings. He admits that they went for a drink after work at the Holiday Inn on one occasion and asserts that V.C. invited him out to lunch in February 2012 for his birthday. He did not accept the invitation. The appellant adds that V.C. gave him three gifts: two bars of soap and a bottle of body lotion. The appellant also disagrees that he was unprofessional to her and other female employees. He also contends that the request to have her office door locks changed was never made. In this regard, it was alleged that the appellant entered V.C.'s office and left her notes. Furthermore, the appellant contends that the allegations that he called V.C.'s subordinate employees to inquire about her absences was part of his responsibility as an Assistant Superintendent. In addition, he explains the comment he referred to V.C. as "crazy" by stating that he said "anybody who thinks that [P.L.] (the Prison Administrator) cannot change the time of a meeting is a little Crazy." The appellant believes that V.C.'s complaint was an attempt to retaliate against him for an incident that occurred on May 17, 2012, where a meeting time was rescheduled by 30 minutes. He emphasizes that V.C.'s complaint was only filed 22 days after this incident. As a remedy, he seeks an award of $15,476.92, the sum equal to the amount of lost wages from his 40 working day suspension, and the revocation of his "demotion" as an Assistant Superintendent 1, Corrections. In support, the appellant submits several e-mails and statements concerning the May 17, 2012 meeting.

In response, the appointing authority submits that there was evidence to support the allegations, corroboration for the charge issued against the appellant, and the investigation supported the finding that there was a violation of the State Policy. The appointing authority states that this arose out of a formal complaint filed by V.C. where she alleged that the appellant subjected her to sexual harassment by asking her to be intimate with him on a number of occasions; looking her "up and down" and smirking; making repeated comments about her appearance, including telling her that she has a beautiful body, advising that she has nice legs, commenting about her hair and how her attire looks on her, and saying she is beautiful inside and out; leaving gifts for her; leaving three notes in her locked office, and when V.C. questioned the appellant about why he was leaving the notes, he indicated that he left the notes because he wanted to be with her intimately and to go out with her; and referring to her as "crazy." During the investigation, witnesses confirmed the following: the appellant entered V.C.'s office on a regular basis and made comments about her appearance; the appellant once entered V.C.'s office and commented on how nice her legs looked; on more than one occasion, the appellant referred to V.C. as "crazy;" V.C. received unsigned notes in her office stating "hi," "We miss you when you're not here," and "It was real nice to see you today . . . Not here Wednesday . . . Looking forward to Thursday afternoon" causing her to ask for the locks to be changed; V.C. was heard yelling at the appellant to get out of her office, and while witnesses did not hear what the appellant had said, V.C.

indicated to the witnesses that the appellant had asked her to be intimate with him again and she had enough of his advances; V.C. often complained about the appellant asking her out, making comments about her appearance, and asking her to be intimate with him; and the secretary for the Administrator confirmed that the appellant would ask for the keys to V.C.'s locked office, even after the locks had been changed, and he often asked the secretary the whereabouts of V.C., even though she did not report to him. The appointing authority notes that a number of witnesses were not present to witness V.C.'s allegations, but their recollection of the statements by V.C. were consistent. In addition, the appointing authority states that the appellant's claim that V.C.'s allegations were based on a meeting which took place in May 2012 were found to be without merit. Moreover, it indicates that the investigation revealed that V.C. did not give the appellant a "gift" of soap but offered the appellant soap she already had in her possession since his face had broken out in a rash. The appointing authority underscores that as a result of these findings, the appellant was disciplined and given a suspension of 40 working days and relieved of his duties as the EED liaison. However, his 40 working day suspension was a result of two separate violations.

The appellant takes issue with the appointing authority's submission. He maintains that its response does not present any evidence supporting V.C.'s allegations nor does the appointing authority provide any corroboration of these allegations. The appellant adds that V.C. never made the allegation of "looking her up and down and smirking." In addition, the appellant argues that leaving a gift, leaving three notes in her locked office, and referring to someone as "crazy" does not constitute sexual harassment according to any standard or definition of the laws of the State or the rules of the appointing authority. He emphasizes that, as indicated in his interview, he often brought back gifts for coworkers. Furthermore, his notes of "hi," "we miss you," and "looking forward to Thursday" were benign. The appellant also justifies entering V.C.'s office by stating that he entered numerous offices of coworkers. Moreover, with regard to the allegation that V.C. was heard yelling at the appellant to get out of her office, the appellant submits that it is significant that witnesses indicated that they could not hear what the appellant had said and a number of witnesses were not present to witness these allegations. The appellant reiterates that the lock to V.C.'s office was never changed nor was a request made to change it. He also maintains that he asked if V.C. had reported to work as he was the Assistant Superintendent 1, Corrections.

In further submissions, the appellant states that several requests for discovery of investigative materials have not been honored by the appointing authority and asserts that this information is essential for providing a proper defense. He contends that the appointing authority has not provided any of the information he requested, but merely provides a summary from its point of view and "restates material information that was previously asserted as fact." He reiterates that the appointing authority has failed to provide any collaborating

testimony or documents in support of the allegations. In addition, the appellant alleges that the appointing authority has failed to produce any witness to support V.C.'s allegations. In contrast, the appellant produces statements from D.D., a Technical Assistant, Management Information Systems; M.B, a retired Correction Major; and T.E., a Principal Payroll Clerk, who state that they find the allegations made by V.C. to be "impossible to believe," believe the allegations to be a form of retaliation by V.C., and that the other alleged behaviors of the appellant have never been reported to any Human Resources personnel. Specifically, D.D. states that the appellant has often left pleasant notes on her desk and gives her gifts. D.D. then states that "in regard to the allegations made by Ms. [C.] of sexual harassment, I found that impossible to believe due to the fact that Ms. [C.] and the appellant went out for a drink together at the Holiday Inn next to the prison about a year and a half ago." M.B. indicates that he is "certain that the allegations of sexual harassment by Ms. [C.] are completely falsified" and states that he knows that V.C. accepted the appellant's invitation to join him for a drink. T.E. submits that with regard to V.C.'s allegation that the appellant has been unprofessional to V.C. and other female employees, that unprofessional behavior had never been directed to her and the alleged behaviors were never reported to Human Resources. It is noted that the record is unclear as to whether D.D., M.B., and T.E. were interviewed by the appointing authority during the investigation. However, their statements suggest that they were not.

CONCLUSION

Initially, it is noted the Commission does not have jurisdiction to review the appellant's disciplinary action as he was serving in the unclassified service at the time of the alleged incident. *See N.J.S.A.* 11A:2-6 and *N.J.A.C.* 4A:2-2,1. It is only when an unclassified employee, who has underlying permanent status, is removed from employment that the employee has the right to file an appeal of that discipline. Moreover, although not contested by the appointing authority, the Commission emphasizes that the appellant is entitled to challenge the finding of a State Policy violation. In this regard, *N.J.A.C.* 4A:7-3.2(n) provides that in a case where a State Policy violation 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. Additionally, *N.J.A.C.* 4A:7-3.2(n)3 states that if disciplinary action has been recommended in the final letter of determination, the party(ies) charged may appeal using the procedures set forth in *N.J.A.C.* 4A:2-2 and regarding minor and major discipline, respectively. The purpose of *N.J.A.C.* 4A:7-3.2(n)3 is to ensure that the issues involving the State Policy violation are addressed in the most appropriate proceeding, namely, the disciplinary appeal of a career service employee. However, *N.J.A.C.* 4A:2-2 and 3 do not apply to unclassified employees and they do not have a comparable appeal process. Moreover, State unclassified employees are governed by the State Policy.

See N.J.A.C. 4A:7-3.1(a)1. Therefore, an unclassified employee may file an appeal with the Commission regarding the violation of the State Policy notwithstanding that disciplinary action has been recommended for the employee. *See In the Matter of George O. Robinson, Jr.* (CSC, decided February 25, 2009). Accordingly, the Commission may review the appellant's appeal.

Moreover, it is noted that the appellant has repeatedly requested access to the investigative materials prepared in relation to the instant matter. The final determination regarding the necessity of disclosure of the materials was deferred, pending receipt of all arguments and documentation from the parties. In light of the detailed submissions received from the parties, particularly the thorough and detailed summary of the investigation prepared by the appointing authority, the Commission does not find it necessary to compel production of the investigative materials in this matter. The Commission is satisfied that the appellant has had a full opportunity to present evidence and arguments on his behalf, and the Commission has a complete record before it upon which to render a fair decision on the merits of the appellant's complaint. *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)

Regarding the merits of this case, *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. Additionally, *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. *N.J.A.C.* 4A:7-3.1(c)2iii states that verbal, written or electronic sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mail, text messages, invitations, gestures or inappropriate comments about a person's clothing are examples of prohibited behavior that may constitute sexual harassment and are therefore a violation of the State Policy. In addition, prohibited behaviors that may constitute sexual harassment include visual contact, such as leering or staring at another's body or gesturing. *See N.J.A.C.* 4A:7-3.1(c)2iv. Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C.* 4A:7-3.2(m)3.

In the instant matter, the Commission has conducted a review of the record and finds that the EED conducted a thorough investigation. Specifically, it interviewed the relevant parties in this matter in investigating the complaint filed by V.C. The EED substantiated the allegations based on interviews with witnesses

that the appellant entered V.C.'s office on a regular basis and made comments about her appearance; the appellant once entered V.C.'s office and commented on how nice her legs looked; V.C. received unsigned notes in her office; V.C. often complained about the appellant asking her out, making comments about her appearance, and asking her to be intimate with him; and the secretary for the Administrator confirmed that the appellant would ask for the keys to V.C.'s locked office, even after the locks had been changed, and he often asked her the whereabouts of V.C., who did not report to him.[3] The EED noted that although there were a number of witnesses who were not eyewitnesses, their recollections of the statements reported by V.C. were all consistent.

On appeal, the appellant merely contends that the allegations against him were false and uncorroborated, as well as filed in retaliation for an incident that happened at a meeting on May 17, 2012. The appellant also attempts to explain other behaviors, such as leaving a gift, leaving notes in V.C.'s office, and referring to V.C. as crazy as saying it does not constitute sexual harassment under the laws of the State. However, the appellant's allegation of retaliation based on a meeting are not persuasive as the EED has indicated that, based on its investigation, there was sufficient evidence to indicate a violation of the State Policy. Moreover, the appointing authority provides a detailed explanation of its investigation.

It is noted that the State Policy 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 definitions under State or federal statutes on discrimination or harassment. *See In the Matter of George Mladenetz* (MSB, decided February 27, 2008). Indeed, sexual comments and gestures can and do constitute a violation of the State Policy and it is emphasized that such conduct need not rise to the level of "severe and pervasive" in order to constitute such a violation. *See In the Matter of Iraida Afanador* (MSB, decided January 31, 2007).

In addition, a violation of the State Policy can occur even if there was no intent on the part of an individual to harass or demean another. Specifically, *N.J.A.C.* 4A:7-3.1(b) provides:

> 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, or ethnic background or any other protected category set

[3] It is noted that, although the appellant argues otherwise, the usage of the term "crazy" could sustain a violation of the State Policy. Nonetheless, the appellant's conduct in other respects clearly violated the State Policy.

> forth in (a) above which have the effect of harassing an employee or creating a hostile work environment. *A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.* (Emphasis added.)

Additionally, the Commission must express its serious concern regarding the appellant soliciting witness statements as part of his appeal to the Commission and his presumed discussion of the issues of this matter, as it violates the strict confidentiality provision of the State Policy. In pertinent part, *N.J.A.C.* 4A:7-3.1(j) states:

> 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 . . . 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.

It has been established that soliciting of information from potential witnesses and third parties during an investigation is improper and an appellant should not share confidential submissions regarding the investigation with other non-parties as it could breach the confidentiality of the investigation. *See e.g. In the Matter of Tiffany Tyson* (CSC, decided March 24, 2010). Further, while it may be appropriate in some instances for an appellant to request that witnesses to an investigation provide information or statements to the Commission during the appeal process, this does not mean that an individual attempting to vindicate himself or herself during the appeal process should share any information with other parties that may have been inadvertently gleaned from approaching a witness. *See e.g., In the Matter of Virginia Larry* (CSC, decided October 8, 2008). As in this case, it appears that the statements are from third parties. The proper course of action would have been for the appellant to provide potential witness names *during* the investigation. In this case, the Commission has significant concerns that the witness statements that the appellant provides were equivalent to an impermissible interrogation of potential witnesses in violation of the State Policy. As previously observed, the statements that the appellant obtained contained specific information about his relationship with V.C. and her allegations that clearly could have undermined the confidentiality of the investigation. More significantly, if the Commission were to permit such actions, it could lead to witness intimidation as well as a breach of

confidentiality and, thus, have a chilling effect on the investigative process that would seriously undermine the intent and purpose of the State Policy. Therefore, the Commission finds that the appellant breached the confidentiality provision of the State Policy. Accordingly, it concludes that the appellant committed an additional violation of the State Policy. However, since the appellant is retired, no further remedial action can be taken by the appointing authority.

Nonetheless, after its review of the statements, the Commission does not find that the information contained in the statements provides a basis to reverse the findings of the EED investigations. For example, it is irrelevant that the appellant never sexually harassed one witness or that she is not aware of any other allegations against him, as one instance of sexual harassment can be a violation of the State Policy. Accordingly, based on the foregoing, the Commission finds that the EED's investigation was thorough and impartial, and a sufficient basis exists to find violations of the State Policy.

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 2nd DAY OF OCTOBER, 2013

Robert Czech

Robert M. Czech
Chairperson
Civil Service Commission

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and
Correspondence

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Attachment

c: F.P.
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

October 3, 2012

F[redacted] P[redacted]
[Mailed to Home Address]

Dear Mr. P[redacted]

Recently, you were interviewed in the investigation of an EED complaint in which you were named as a respondent. Please be advised that the investigation did substantiate that you violated the *Policy Prohibiting Discrimination in the Workplace*. You are reminded to conform to the policy set forth in the attached advisory Equal Employment Division Advisory to Respondent (Retaliation), specifically that any acts of retaliation against a complainant or witness in an EED matter is strictly prohibited and will result in sanctions, if proven.

Sincerely,

Victoria L. Kuhn, Esq., Director
Equal Employment Division

VLK/gbp

Enclosure

c: Robert Chetirkin, Associate Administrator (ASL) NSP[12:06.001-V[redacted] C[redacted]