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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of W.S., Department of
Corrections

Discrimination Appeal

CSC Docket No. 2016-800

ISSUED: OCT 19 2017 (HS)

W.S., a former Senior Correction Officer with the Department of Corrections (DOC),¹ represented by John T. Herbert, Esq., appeals the determination of the Commissioner, which found 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, a female, filed a complaint with the Equal Employment Division (EED) alleging discrimination on the bases of sex/gender and retaliation against J.P., a male former Correction Major;² J.M., a male former Correction Sergeant;³ K.U, a male Correction Sergeant; K.G., a female Senior Correction Officer; and L.B., a female Senior Correction Officer. In response, the EED conducted an investigation during which it interviewed individuals who possessed pertinent information and reviewed relevant policies, procedures and evidence. After its investigation, the EED did not substantiate a State Policy violation by the respondents, for the reasons described below.

In her complaint, the appellant made the following specific claims of adverse treatment against J.P. based on sex/gender and her previous complaints of disparate treatment received in the Central Transportation/Central Medical Unit (CTU) under a former Correction Major: (1) he used K.G. and M.D., Senior

¹ It is noted that the appellant separated from State service effective February 29, 2016.
² J.P. separated from State service effective March 1, 2015.
³ J.M. separated from State service effective September 1, 2015.

Correction Officer, a male, to harass her to cause her to behave in an unprofessional manner; (2) she heard him destroy her Special Custody Report by ripping it while they were speaking on the telephone; (3) he used K.U. to file a false disciplinary charge against her to have her removed from the CTU; (4) he referred to her as "crazy" and stated that she should not be in the CTU; (5) he referred to her and other females in the unit as "useless" and advised that seniority is not considered for assignments in the CTU; (6) he singled her out when he spoke with an administrator and questioned whether she was leaving her weapon overnight in the armory; (7) he did not permit her to call him on his State cellular telephone, yet others were permitted to do so; (8) he assigned her to work with an officer with whom she had had issues that were reported to the Special Investigations Division (SID), so she called out sick to avoid working with the officer; (9) he placed her Special Custody Reports on a public bulletin board and spoke to her on a speakerphone in the presence of others; (10) he coughed the gender slur "cunt" as she walked past his office; and (11) he improperly requested documentation for her family medical leave.

J.P. was interviewed and denied using officers to harass the appellant. The investigation revealed that the appellant had had contentious exchanges with other officers in the CTU, some of which involved reports to SID. He denied ripping or destroying her Special Custody Reports and using K.U. to file a false disciplinary charge against the appellant. The investigation revealed that the appellant was properly charged with abandoning her post. J.P. further denied referring to the appellant by the slurs "crazy" and "cunt," saying that females are useless in the CTU and saying that the appellant should not be in the CTU. As to the issue of seniority, J.P. confirmed that seniority is not considered when assigning officers in the field. The investigation revealed that units such as the CTU and the Special Operations Group are specialized units, a fact that every officer is made aware of at the time they join either unit. As the CTU is a specialized unit, seniority is not considered and there are no "bidding rights" in that unit. Rather, the need to maximize operational efficiency, while ensuring that overtime is kept to a minimum, is paramount and governs the assignments; seniority is only considered when approving vacation requests. In addition, J.P. denied targeting the appellant by asking an administrator about leaving her weapon overnight at the armory; rather, he advised that he inquired about everyone in the unit who was leaving his or her weapon overnight and issued a unit-wide memorandum advising that this practice was prohibited. J.P. denied prohibiting the appellant from calling him on his State cellular telephone, speaking to her while on his office speakerphone, and placing her Special Custody Reports on a public bulletin board. J.P. advised that while he does not prohibit anyone from contacting him on his State cellular telephone, he does advise everyone to only contact him by this method in emergencies. He advised that he speaks with everyone using the speaker on his office telephone and confirmed that he once did refuse to take the appellant off the speaker as no one else was present at the time. He indicated that he does not use

the speaker function if someone is in his office. With respect to the allegation that J.P. continued to schedule the appellant to work with an officer with whom she had conflicts, the investigation revealed that the appellant had a heated verbal exchange with L.B. and that there was no operational basis to separate them. As such, J.P. properly continued to schedule them in assignments that maximized the operational efficiency of the unit. Finally, J.P. denied requesting documentation for the appellant's family medical leave.

The appellant made the following specific claims against J.M.: (1) he told the appellant that since she is a female, she is "useless" on the unit and that seniority is not considered in assignments; (2) he placed a male with less seniority than the appellant at Northern State Prison (NSP) despite her numerous requests to be transferred there as her start location; (3) he referred to the appellant as "crazy" and said that she should not be on the unit; (4) he coerced K.U. into writing a charge against the appellant to have her removed from the unit; (5) he used J.P. to harass her; and (6) he told officers that he does not want her on the unit and encouraged them to submit complaints against the appellant. J.M. was interviewed. He denied calling the appellant and other female officers "useless" and denied calling the appellant "crazy." He advised that assignments are made based on the operational needs of the unit, not seniority. He denied telling the appellant that females, including the appellant, were no longer going to be assigned to NSP because they are useless. Finally, he denied encouraging any CTU officer to engage in conduct to harass the appellant in order to have her removed from the unit.

The appellant made the following specific claims against K.U.: (1) he used officers to harass her in an attempt to cause her to behave in an unprofessional manner and (2) on December 16, 2014, he permitted her partner to leave the appellant alone with inmates, but the appellant was disciplined for the same conduct. K.U. was interviewed and denied subjecting the appellant to harassment and using others to harass her. He advised that he had not observed anyone subject the appellant to adverse treatment. K.U. denied that the appellant was left alone with inmates. Rather, he indicated that the appellant and her partner were on a transport at the Essex County Courthouse. The appellant's partner contacted K.U. because he became ill on duty. K.U. advised that as the appellant's partner's personal vehicle was parked at East Jersey State Prison, K.U. gave him permission to take the State vehicle back to his personal vehicle so he could drive himself home. K.U. advised that the appellant was not left alone with inmates as another transport crew was already at the courthouse when the appellant's partner left, and K.U. assigned the appellant to that crew to finish the assignment. In contrast, K.U. advised that the appellant submitted a Special Custody Report in which she alleged that she had been treated unprofessionally by K.G. and M.D. on October 7, 2014. In that report, the appellant indicated that she and her partner were at the hospital with an inmate. The appellant further indicated in the report that she was involved in a heated exchange with K.G. and M.D. and that the exchange occurred outside

the hospital while she was attempting to use her cellular telephone since she could not get a signal inside the hospital. K.U. advised that this meant that the appellant's partner was still in the hospital, alone, with the inmate, which was an abandonment of her post. For that reason, the appellant was properly served with a disciplinary charge for the October 7, 2014 incident.

The appellant made specific claims against K.G. and M.D. Specifically, she claimed that sometime in October 2014, she and her partner were assigned to be with an inmate at the hospital. The appellant alleged that they were relieved for a meal break by K.G. and M.D. She claimed that K.U. had advised that she could take a one-hour meal break as she was assigned to the hospital for more than eight hours. The appellant contended that after returning from her meal break, the inmate told her that K.G. and M.D. had been talking about the appellant in the inmate's presence. The appellant alleged that the inmate said that the officers had said disparaging things about her and that they did not like her. The appellant alleged that she then had to step outside to use her cellular telephone to call an ambulance transport for the inmate. The appellant claimed that she went outside because she was unable to get a signal for her telephone inside the hospital and all of the hospital landlines were in use. The appellant alleged that while she was outside, she confronted K.G. and M.D. for speaking about her in the inmate's presence. The appellant claimed that K.G. responded, "Bitch take your crazy ass downstairs. Don't no one want to hear this crazy shit. You need to take your ass back downstairs with your fucking inmate," and then said to M.D., "Let her fucking crazy psychotic ass go downstairs." K.G. was interviewed for the investigation and denied referring to the appellant as a "bitch" or "crazy psychotic ass." K.G. and M.D. both denied talking about the appellant in the presence of the inmate. They advised that they were sent to the hospital to relieve the appellant and her partner for a meal break. They indicated that the appellant was only supposed to take a 30-minute break as they had to report to another assignment as soon as they completed the appellant's break; however, the appellant was gone for nearly an hour. K.G. and M.D. advised that the appellant told them that K.U. had said that the appellant could take one hour, which they contended could not be correct. They further indicated that the appellant confronted them outside the hospital claiming that the inmate told her that they had been saying disparaging things about her in the inmate's presence, which they both denied. Finally, a witness confirmed that the appellant confronted the officers outside the hospital.

The appellant made specific claims against L.B. She claimed that on April 23, 2014, L.B. falsely reported to the supervisors that the appellant had reported to work 30 minutes late. The appellant alleged that she confronted L.B. the next day about the false allegation and that L.B. said that no one in the CTU, including supervisors, liked the appellant or wanted her in the unit. Although this allegation did not touch the State Policy, L.B. was interviewed. While L.B. admitted that she

had reported the appellant's lateness and that the appellant confronted her, she denied engaging in any behavior that touched the State Policy.

The appellant also named T.C., Correction Lieutenant, as a respondent, alleging that he was the management representative at her February 2015 disciplinary hearing. However, as this allegation did not touch the State Policy, the EED did not include T.C. as a respondent in its investigation.

On appeal to the Civil Service Commission (Commission), the appellant claims that her discipline was gender and race based and should be rescinded. She argues that the EED investigation was superficial and the determination essentially dismissed her allegations on the simple denial of facts or wrongdoing by each witness without a more thorough collection, review and analysis of all relevant information. The appellant contends that some or all of the witnesses she identified to the EED investigator, individuals she also lists on appeal, can support her claim of being told that a female is "useless" and "seniority has no value in this unit," among other claims. However, it appears that none of these witnesses were interviewed and/or none of the information from such interviews was considered as none are mentioned in the EED's determination. The appellant also states that her request for a copy of the information the EED investigator recorded in their meeting was refused and she was only provided with a copy of her signed Prohibition Against Retaliation. In addition, the appellant argues that contradictory evidence, which was provided to the EED investigator, was not referenced in the determination. For example, J.P.'s statement that "[a]s the CTU is a specialized Unit, seniority is not considered and there are no bidding rights" is contradicted by an August 20, 2014 memorandum referencing unit seniority in CTU location staffing decisions. As another example, the appellant reported that on December 16, 2014, she had been left alone with four male inmates. The appellant claims that this report contradicts K.U.'s concern that on October 7, 2014, the appellant had left a male officer alone with one female inmate, who could not move without the assistance of ambulatory care. Thus, she contends that an officer can be left with an opposite gender inmate. Further, the appellant argues that her retaliation concerns were not addressed. In this regard, she asserts that her reports of discrimination that led to the October 7, 2014 retaliation incident were ignored. Specifically, on April 27, 2014, the appellant reported that L.B. had threatened her job. The appellant also reported her concern over J.P.'s refusal to accept her whistleblowing report and that she had filed a Claim for Damages against the State on May 22, 2014. The appellant requests a hearing.

In support, the appellant submits, among other documents, a copy of the August 20, 2014 memorandum referenced above. It is noted that this memorandum, with the subject "Start Location Changes," was from T.C. and addressed to "All Custody Staff – Central Transportation Unit." The memorandum indicated the following:

Please be advised that if any officer would like to request a change in their starting location and/or shift, they must submit a special report to this office no later than August 29, 2014. Also note that all changes will be based on unit needs, unit seniority and operational effectiveness and are not definite nor is there an effective timeframe for such changes. Any questions or concerns please contact [T.C.].

It is also noted that J.P. was on the memorandum copy list.

In response, the EED maintains that its investigation was not arbitrary, capricious or unreasonable and was supported by the evidence. It submits that it conducted an extensive investigation, which included an interview with the appellant taking place over three days and covering all of her allegations, interviews with 14 witnesses, and a review of all pertinent information. On the issue of witnesses, the EED states that the appellant named 32 witnesses and was asked to provide a proffer as to what information each would provide. Following the proffer, the EED determined that six of the witnesses named by the appellant possessed relevant information that was not duplicative. The EED also randomly selected another eight individuals connected to the appellant's allegations and the CTU to interview, for a total of 14 witness interviews. As to the list of individuals the appellant claims were not interviewed, the EED asserts that, without violating confidentiality, the appellant's claim is false. In this regard, the EED states that the investigation included interviews with witnesses named by the appellant during her interview and witnesses named on appeal; however, the witnesses did not corroborate her claims of discrimination/harassment and/or retaliation. With respect to the investigator's refusal to provide a copy of the information recorded in the meeting with the appellant, the EED maintains that it does not release witness statements while an investigation is pending. Such statements are only released at the conclusion of the investigation upon written request of the witness, and the appellant would only have been able to request her own statement and not other witnesses' statements.

In addition, the EED argues that the appellant's assertion that the custody personnel assigned to the CTU have bidding rights is incorrect. It notes that the August 20, 2014 memorandum was authored by T.C., not J.P. Although the appellant argues that the memorandum provides that changes in "starting locations" will be made based on unit seniority and that this confirms that members of the CTU have bidding rights, the EED maintains that the CTU is a specialized unit. The memorandum actually provides that changes to starting locations will be based on "unit needs, unit seniority *and* operational effectiveness" (EED's emphasis). It also provides that any changes will not be definite and that there is no effective timeframe for any changes. The EED emphasizes that bidding rights confer on custody personnel an *entitlement* to a certain position/location based on years of service with DOC or in a title. However, the memorandum does not confer

this entitlement onto members of the CTU; rather, it provides that unit seniority is only *one* of a number of considered factors when determining starting locations.

The EED also contends that the December 16, 2014 incident was not similar to the October 7, 2014 incident. Specifically, on December 16, 2014, the male officer and the appellant were handling a male inmate transport to the Essex County Courthouse when the male officer became ill and requested permission from their supervisor to leave early, which was granted. In addition to being at the Courthouse, a somewhat secure location, there was another CTU crew physically at the Courthouse. That crew was immediately assigned to help the appellant complete her transport assignment. The EED states that, in contrast, the appellant and her male partner, on October 7, 2014, were at a hospital alone with a female inmate when the appellant left the building without permission to make a telephone call on her personal cellular telephone. The appellant then remained outside of the building while she engaged in a heated exchange with two officers who had come to assist them, all while her partner remained in the hospital alone with the inmate. As such, the EED maintains that its determination did not contain information that contradicted the evidence.

Further, the EED acknowledges that the appellant's allegation of retaliation was not specifically addressed in its determination. However, during her interview, the appellant alleged that, in addition to being acts of discrimination and harassment, the incidents she set forth were in retaliation for a Charge of Discrimination she filed with the United States Equal Employment Opportunity Commission in early 2014 and the filing of a Tort Claim Notice in early 2014. The EED maintains that the evidence in its investigation revealed that the appellant was not the target of adverse treatment due to discrimination and harassment. Rather, the investigation revealed non-discriminatory, legitimate business reasons for the actions taken regarding the appellant. As such, the EED argues that the appellant was not subjected to retaliation.

CONCLUSION

The appellant requests a hearing in this matter. Discrimination appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service, 155 N.J. Super. 517 (App. Div. 1978)*.

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. *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)*. The State Policy is a zero tolerance policy. See *N.J.A.C. 4A:7-3.1(a)*. 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 in this matter and finds that an adequate investigation was conducted, that the relevant parties in this matter were interviewed and that the investigation failed to establish that the appellant was discriminated against or harassed in violation of the State Policy. The EED appropriately analyzed the available documents and interviewed several witnesses, including individuals who were named by the appellant during her interview and on appeal, in investigating the appellant's complaint and concluded that there was no violation of the State Policy based on the appellant's sex/gender, any other protected category, or retaliation. On appeal, the appellant argues that the EED was in possession of evidence that contradicted its determination. Specifically, she argues that the August 20, 2014, which referenced unit seniority, contradicted J.P.'s indication that seniority was not considered in the CTU and there were no bidding rights. She also argues that the events of December 16, 2014 show that an officer can be left with an opposite gender inmate and contradict K.U.'s concern that the appellant had left a male officer alone with one female inmate on October 7, 2014. These arguments are not persuasive. In this regard, the August 20, 2014 memorandum provided that any change in "starting location and/or shift" for CTU custody staff would be based on "unit needs, unit seniority *and* operational effectiveness" (emphasis added) and would *not* be "definite" or have "an effective timeframe." Unit seniority was only one factor when considering changes, which, moreover, were not definite and did not have an effective timeframe. As such, the memorandum did not create any entitlement to a particular starting location or shift based on unit seniority. With respect to the events of December 16, 2014, the EED has persuasively explained that there were material differences between the events of that date and the events of October 7, 2014. In this regard, on December 16, 2014, the male officer became ill and received permission to leave. The appellant was at a courthouse, a secure location, and there was another CTU crew physically present there. That crew was immediately

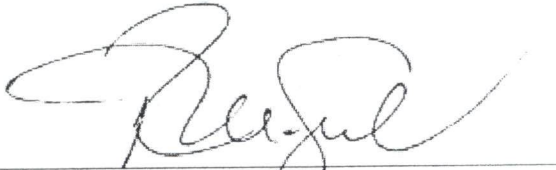
assigned to assist the appellant in completing the male inmate transport. In contrast, on October 7, 2014, the appellant left the building without permission to make a call on her personal cellular telephone. She then remained outside while she engaged in a heated exchange with two officers who had come to assist, while the appellant's male partner was left alone with a female inmate. These differences explain why the appellant was charged with discipline for the October 7, 2014 incident while the male officer involved in the incident of December 16, 2014 was not charged for the events of that date. Further, the appellant's contention that the discipline she received for the events of October 7, 2014 was retaliatory is unpersuasive. In this regard, the investigation revealed legitimate reasons for the discipline, and there was no indication that the discipline was related to any previous report of discrimination. Accordingly, the investigation was thorough and impartial, and no substantive basis to disturb the EED's determination has been presented.

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 18TH DAY OF OCTOBER, 2017



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