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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of J.C., Department of
Banking and Insurance

CSC Docket No. 2016-2819

Discrimination Appeal

ISSUED: JUN 15 2017 (CSM)

J.C., an Investigator 2 with the Department of Banking and Insurance (Banking and Insurance), appeals the determination of the Acting Commissioner, Banking and Insurance, which found sufficient evidence to support a finding that he had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, on September 8, 2014 the appellant sent an e-mail entitled, "Three Presidents," to 16 people, 8 of whom were Banking and Insurance Employees. One of the individuals on the recipient list, G.H., directed that the email be sent to Human Resources, who then forwarded to the Equal Employment Opportunity Office (EEO). The email consisted of pictures of Presidents Dwight Eisenhower, Herbert Hoover, and Harry Truman, along with, in pertinent part, the following statements:

Back during the great depression, Herbert Hoover ordered the deportation of ALL illegal aliens in order to make jobs available to American Citizens that desperately needed work.

Harry Truman deported over two million illegal aliens after WWII to create jobs for returning veterans.

In 1954, Dwight Eisenhower deported 13 million illegal Mexicans. The program was called Operation Wetback. It was done so WWII and

Korean War veterans would have a better chance at jobs. It took two years, but they deported them!

Now, if they could deport the illegal aliens back then, they could surely do it today. If you have any doubts about the veracity of this information, enter Operation Wetback into your favorite search engine and confirm it for yourself.

...

And: Remember to pay your taxes – 12 to 20 million illegal aliens – are depending on it.

The EEO investigated the matter and found that the email referred to illegal aliens or illegal Mexicans, a program entitled “Operation Wetback” and how the program might be duplicated in today’s administration. As the term “Wetback” is defined as a derogatory term used in the United States for illegal foreigners, most commonly from Mexican and Central American nationals, the investigation determined that the appellant violated the State Policy.

On appeal, the appellant states that he did not direct his email to any particular individual who is a Mexican or Central American national. He asserts that this evidences that he did not discriminate or harass anyone because no individual in a protected category was the target of his email. Further, he asserts that he did not intend to violate the State Policy and explains that his email was to highlight the plight of veterans who have a high unemployment rate. The appellant also states that no one complained that they felt discriminated or harassed because of the email so there is no victim. Finally, the appellant states that this was a learning experience for him and he will carefully review the language in his emails before he sends them to others.

In response, the EEO states that the appellant concedes that his email contained a derogatory term and that he is incorrect in his assumption that he did not discriminate or harass anyone by the use of the term “Wetback.” In this regard, it presents that the email was forwarded to the EEO because one of the recipients was offended by the email and wondered why they received it. Since the email was sent to 16 individuals, eight of whom are employed by Banking and Insurance, the EEO maintains that the appellant violated the State Policy.

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. To achieve this goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described under this policy. This is also 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 the unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

N.J.A.C. 4A:7-3.1(a)2 provides that the State Policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by the policy.

N.J.A.C. 4A:7-3.1(b) provides that 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 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. Additionally, the appellant shall have the burden of proof in all discrimination appeals. See *N.J.A.C. 4A:7-3.2(m)(3)*.

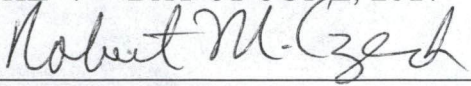
The Commission has conducted a review of the record and finds that the determination of the appointing authority was improper. The investigation found that the appellant sent an email that contained a term that is defined as derogatory to Mexican and Central American nationals and discusses how a deportation program may be duplicated by today's administration. While chain/unsolicited emails may be a violation of the appointing authority's internal policy, the program referred to in the email, "Operation Wetback," is a historical fact, and its usage, as prefaced with the reference to the "Operation" that took place, did not appear to be made in a derogatory context. Therefore, based on the foregoing, the Commission finds that the appellant did not violate the State Policy.

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's personnel record corrected to reflect a finding that the allegation that he violated the State Policy was not substantiated.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 7TH DAY OF JUNE, 2017



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