



B-36

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of D.N.,
Department of the Treasury

CSC Docket No. 2014-2627

Discrimination Appeal

ISSUED: MAR 09 2015 (DASV)

D.N., an Auditor 2, Taxation, with the Department of the Treasury, appeals the attached determination of the Affirmative Action Officer, stating 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, an Asian-American, filed a discrimination complaint alleging that N.S., an Auditor 2, Taxation, used his administrative function of assigning accounts and distribution cases to the detriment of the appellant in retaliation for her reporting racial discrimination and violence in the workplace. In response, the Office of Equal Employment Opportunity/Affirmative Action and Diversity Programs (Office of EEO/AA) reviewed its records and found that the appellant filed a discrimination complaint in 2007 and a workplace violence complaint, but she did not name N.S. as a respondent. Moreover, the appellant's retaliation complaint raised issues regarding her performance evaluation and how the distribution of assignments affected her ratings. The Office of EEO/AA indicated that those issues were not within its jurisdiction to address. Consequently, in its April 15, 2014 decision, the Office of EEO/AA determined that the appellant's allegations of retaliation did not implicate the State Policy and no further action was taken.

It is noted that agency records reveal that the appellant filed a discrimination complaint with the appointing authority in 2007, naming N.S. and

five other co-workers, as having "unspoken discrimination" against her.¹ Specifically, she alleged that N.S. avoided her and was irritated when he had to assist her when the Auditor 1 was not in the office. The appointing authority could not substantiate that the incident or the other incidents outlined by the appellant were motivated by her race. Therefore, the appointing authority concluded that the appellant was not subjected to violations of the State Policy. The appellant appealed the determination to the Civil Service Commission (Commission). However, the Commission denied the appellant's appeal, as there was no evidence to support her claim of discrimination. The Commission also noted that unprofessional behavior or disagreements between co-workers could not sustain a violation of the State Policy. See *In the Matter of D.N.* (CSC, decided January 14, 2009).

On appeal, the appellant contends that she did in fact name N.S. in her 2007 racial discrimination complaint. She provides letters from the former EEO/AA Officer, who acknowledged receipt of her complaint against N.S. and the other individuals. Additionally, the appellant claims that since she started in the Nexus Section in 2005, N.S. has been hostile towards her. Although N.S. is not a supervisor, he assigns cases and "is always free to do things according to his own personal bias." Further, the appellant alleges that because her previous complaints, which included a workplace violence complaint, were not substantiated, the hostility continues and this time her interim performance assessment review (PAR) ratings were affected. In that regard, the appellant received an interim rating of "1," unsatisfactory, in the category of Goal Achievement for the September 1, 2013 to August 31, 2014 rating cycle. Her overall interim rating was a "2," successful.

In support of her appeal, the appellant submits her response to her supervisor regarding her "1" rating. She asserted in the response that she was only assigned regular cases, and not "VDA" cases, which she described as 'pre-cooked' because the taxpayer volunteer[s] to submit the tax returns with usually large dollar amounts . . . compared to a regular Nexus case which involves several follow-up letters that goes up to several months before the [case] can be closed." The appellant maintained that the "selection of accounts were subjective and the distribution of cases were biased" and "[i]t looks to [her] like a continuing saga of [N.S.] using his administrative function to camouflage revenge on [her] for reporting Racial Discrimination and Violence in the Workplace in the Nexus Section." For her remedy, the appellant requests that her rating of "1 in Goal Achievement be changed to a "2," the assignment of cases be made by an Auditor 1 and not by N.S., who is an Auditor 2, Taxation; assignments be distributed in a non-biased manner to auditors based on their titles/grade level; written procedures be drafted with respect to the distribution of cases every month to be assigned to auditors in equal

¹ The other individuals included S.K., who was referenced in the appointing authority's April 15, 2014 determination.

proportion as to the type of cases; and for a written procedure to clearly specify "how the monthly number of production [of cases] is determined."

In response, the appointing authority indicates that the appellant's 2007 discrimination complaint and her workplace violence complaint regarding the altercation with S.K. did not name N.S. as a respondent or perpetrator. Nonetheless, it maintains that the reason that the appellant's complaint was not accepted was because it related to her PAR, which the Office of EEO/AA does not have jurisdiction to address. The appointing authority explains that such cases are generally referred to the Office of Human Resources for review and will only be investigated by the Office of EEO/AA if the department's PAR Coordinator "is not satisfied that the performance rating was justified." In this case, the Office of EEO/AA requested that the PAR coordinator review the appellant's rating. Initially, it was noted that N.S. is not the appellant's supervisor. The appellant's supervisor is P.L., a Supervising Auditor Taxation, and he was able to explain that the appellant's case completion was not "close enough" to receive a successful rating. P.L. and the appellant had discussed that many of her cases were "no longer functional and could be closed," which would have increased the number of her completed cases. The appellant did not close these cases. Moreover, the PAR Coordinator found that, although the appellant believed that she was receiving "harder cases," the cases are assigned randomly. P.L. noted that the appellant received an unsatisfactory rating in only one category, but her overall rating was satisfactory. The PAR Coordinator emphasized that the overall rating is "significant" to the employee and not the assessment in the individual categories. Therefore, the appointing authority submits that there was no basis to have investigated the appellant's complaint.

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. 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)*. Moreover, the appellant shall have the burden of proof in all discrimination appeals. See *N.J.A.C. 4A:7-3.2(m)4*.

It is well established that in order to sustain a claim of retaliation under the State Policy, the alleged retaliation must be in response to an employee's participation in a prior discrimination proceeding. In this case, while there is no dispute that the appellant filed a discrimination complaint in 2007, the appointing authority is mistaken that N.S. was not named in that complaint. Contrary to the findings of the Office of EEO/AA, the appellant identified N.S. in her 2007 discrimination complaint, along with S.K and other individuals, as having "unspoken discrimination" against her. Therefore, the appellant's current complaint of retaliation implicates the State Policy.

However, the appointing authority maintains that the reason that the appellant's complaint was not accepted was because it related to her PAR, which the Office of EEO/AA does not have jurisdiction to address. The Commission notes that it would ordinarily not review claims with respect to PAR ratings in the context of a discrimination appeal. See *In the Matter of Ann Doherty* (MSB, decided May 5, 2006) (Review of allegations of false comments on performance evaluation declined in the context of a discrimination appeal since another appeal mechanism was available to challenge performance standards or final ratings). See also, *In the Matter of Jayantilal Patel* (CSC, decided August 27, 2008) and *In the Matter of Teresa Lockette* (MSB, decided May 7, 2003). In that regard *N.J.A.C. 4A:7-3.2(m)1* provides that employees filing appeals which raise issues for which there is another specific appeal procedure must utilize those procedures. *N.J.A.C. 4A:6-5.3(b)* and (c) set forth specific appeal procedures for employees wishing to challenge performance standards or certain final PAR ratings.² Regardless, as determined above, the appellant's complaint of retaliation by S.K. implicates the State Policy and may be reviewed.

Based on the information presented by the appointing authority and the fact that the appellant's assertions are unsupportable, the Commission finds no basis to find retaliation. N.S. is not the appellant's supervisor. P.L., who is her supervisor, presented justification as to why he rated her unsatisfactory in the Goal Achievement category. It was also found that cases are assigned randomly and many of the appellant's cases were "no longer functional and could be closed," but the appellant did not do so. Under these circumstances, the appellant fails to assert a nexus between N.S.'s assignment of cases and her unsatisfactory rating or

² The regulation permits employees to challenge performance standards or final PAR ratings. The appellant's complaint relates to an interim rating. The record does not indicate what the appellant received as her final PAR rating or if she challenged the same. It is noted that *N.J.A.C. 4A:6-5.3(e)* states that an employee may appeal the final departmental decision to the Commission within 20 days of receipt of the decision. The appellant would not be able to appeal prior to the departmental decision, nor do agency records reveal that she filed an appeal on that issue.

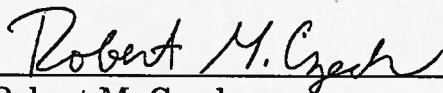
that the assignments themselves were motivated by retaliatory reasons. Therefore, the appellant has failed to meet her burden of proof in this matter. *See N.J.A.C. 4A:7-3.2(m)4*. Accordingly, no basis exists to find a violation of the State Policy.

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 4TH DAY OF MARCH, 2015



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and
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Attachment

c: D.N.
Deidre L. Webster Cobb
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State of New Jersey

CHRIS CHRISTIE
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Lt. Governor

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ANDREW P. SIDAMON-ERISTOFF
State Treasurer

April 15, 2014

Ms. D. N. [REDACTED]
[REDACTED]
[REDACTED]

Re: *Discrimination Complaint*

Dear Ms. N. [REDACTED]:

Thank you for bringing your concerns about discrimination based on retaliation to my attention. We received your complaint against N. [REDACTED] S. [REDACTED] on April 7, 2014. Your complaint specifically alleges that Mr. S. [REDACTED] is using his administrative function with respect to the selection of accounts and distribution of cases in the Nexus Section of the Division of Taxation to retaliate against you for reporting racial discrimination and violence in the workplace.

A review of our records indicates that in 2007 you filed a complaint alleging discrimination based on race. This complaint was filed on or about the same time as the workplace violence complaint filed with the Office of Labor Relations. It is noted that N. [REDACTED] S. [REDACTED] was not named as a respondent or perpetrator in either of the complaints which arose out of a verbal altercation between yourself and S. [REDACTED] K. [REDACTED] concerning an extra chair used by Ms. K. [REDACTED]. At that time, we determined that management took appropriate action to address the matter and advised all concerned that the behavior exhibited was inappropriate for the workplace and would not be tolerated. It was also determined that you failed to state how other incidents you outlined in your complaint concerning employees in your work unit were related to your race. As a result, we took no further action in regard to your complaint.

It is noted that the information provided in support of your current complaint is limited to details of the selection of account and distribution of cases in the Nexus Section and how it has impacted your performance rating. You also make several suggestions on how to improve the selection of account and distribution of cases process and express concern that your suggestions have been disregarded. Unfortunately, the Office of EEO/AA and Diversity Programs does not have jurisdiction to address performance evaluation complaints. As a result, it is determined that your allegations of retaliation do not implicate the *New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy)* and, therefore, we will not take further action in regard to this matter.

Please be advised that you have the right to appeal this determination to the Merit System Board, P.O. Box 312, Trenton, NJ 08625-0312 within 20 days of your receipt of this letter. The appeal must

be in writing, state the reason(s) for the appeal and specify the relief requested. All materials presented at the department level and a copy of this determination letter must be included. However, if it is determined that disciplinary action will be taken, the procedures for the appeal of disciplinary action must be followed.

You are reminded that the *State Policy* prohibits retaliation against any employee who files a discrimination complaint or participates in a complaint investigation. Furthermore, this matter is to remain confidential and the results of the investigation are not to be disclosed to others.

Please do not hesitate to contact me at 609-984-7778 if you have any questions.

Very truly yours,

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
EEO/AA Officer

Enclosure

cc: Mamta Patel, Director, Division of EEO/AA
Michael Bryan, Director, Division of Taxation

