B-21

STATE OF NEW JERSEY

In the Matter of S.W., Department of Human Services	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2014-1177	:	Discrimination Appeal

ISSUED: OCT 2 4 2014 (WR)

S.W., a Tax Service Representative 3 with the Department of the Treasury, appeals the attached determination of the Equal Employment Opportunity/Affirmative Action Office (EEO), Department of the Treasury, which determined that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

On November 30, 2011, A.F., a female, African-American Taxpayer Service Representative 2, filed a discrimination complaint against the appellant, a male Caucasian, based upon color and race. Specifically, A.F. alleged that the appellant made a racially charged comment by stating, "Martin Luther King had a dream and you see what happened to him." A.F. further alleged that the appellant had made jokes in the past about African-Americans, Arabians, Homosexuals and other groups. Upon receipt of the complaint, the EEO conducted an investigation which found the appellant made the comment in response to a coworker's comment about dreaming she was back in bed. Thus, the investigation determined that the appellant's comment did not violate the State Policy because it concerned Martin Luther King's dream and not his race. However, while the investigation did not substantiate the claim that the appellant had made discriminatory comments about African-Americans and Arabians in the past, it did substantiate the claim that he made derogatory remarks about homosexual men and women in the past. Consequently, the appellant received a written warning and training.

On appeal to the Civil Service Commission (Commission), the appellant states that A.F.'s complaint was uncorroborated and her allegation that he had

made discriminatory comments in the past was never presented to him. Therefore, because he did not have the opportunity to respond to that part of the complaint, the EEO's conclusion is arbitrary and capricious.

In response, the EEO contends that during an interview with the appellant, it read A.F.'s complaint to him verbatim, to which he responded, "I do not know where that's coming from." The EEO states that the appellant confirmed his response on October 10, 2013, when he signed a written summary of the statements he made during his interview. Additionally, the EEO states that it sustained the allegation that the appellant had made derogatory statements about homosexual men and women in the past because one witness "identified at least two occasions where he or she heard [the appellant] engage in this conduct."

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. Moreover, *N.J.A.C.* 4A:7-3.1(b) states 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, ethnic background or any other protected category set forth in (a) above. 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 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 of discrimination or harassment. *See In the Matter of George Mladenetz* (MSB, decided February 27, 2008). 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 EEO conducted a thorough investigation, which included interviewing several witnesses, and concluded that the appellant violated the State Policy. While the appellant claims that he was never presented with the allegation that he had made discriminatory comments towards homosexual men and women in the past, the record reflects that he was presented such allegations in his interview. Additionally, the appellant was provided the opportunity to present his argument on appeal, but failed to do so. As such, sufficient evidence in the record exists to support the EEO's finding that the appellant violated the State Policy. The Commission notes that the penalty of a written warning and training is

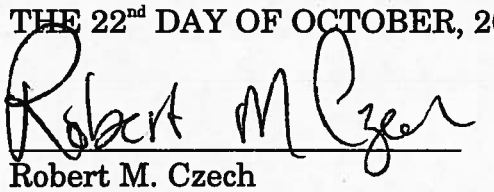
not unduly harsh under the circumstances. Accordingly, the appellant has failed to meet his burden of proof in this matter. *See N.J.A.C.* 4A:7-3.2(m)3.

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 22nd DAY OF OCTOBER, 2014



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Attachment

c: S.W.
Douglas Ianni
Mamta Patel
Joseph Gambino

State of New Jersey

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

DEPARTMENT OF THE TREASURY
DIVISION OF ADMINISTRATION
OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY/
AFFIRMATIVE ACTION AND DIVERSITY PROGRAMS
P.O. BOX 210
TRENTON, NJ 08625

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

October 18, 2013

Mr. [redacted]

Re: ***Discrimination Complaint***

Dear Mr. W[redacted]:

This is in further reference to the discrimination complaint filed against you by A[redacted] F[redacted] on the basis of color and race.

The Office of EEO/AA and Diversity Programs conducted an investigation during which you, the complainant and three witnesses were interviewed related to the allegations raised in Ms. F[redacted]'s complaint. It has been alleged that on July 30, 2013, during a group meeting, you made a racially charged comment/joke. Specifically, Ms. F[redacted] alleges you commented, "Martin Luther King had a dream and you see what happened to him". The complainant has also alleged that you have made comments and jokes in the past about Blacks, Arabians, Homosexuals and other groups which you deny.

Although the complainant unequivocally stated to you that she was offended by your comment, nothing in the investigation revealed that your remark was based on color or race. It appears that the comment was an off-handed remark in response to a co-worker's comment about dreaming she was back in bed. You made the comment "Martin Luther King had a dream and you see what happened to him" not because Martin Luther King Jr. was African-American but rather because he had a dream. Based on these facts, although the comment may have been a poor choice of words, a violation of the *New Jersey State Policy Prohibiting Discrimination in the Workplace* on the basis of color or racial discrimination or harassment **cannot be** substantiated.

As for the allegation that you made disparaging comments regarding African Americans, Arabians and Homosexual men and women, the evidence gathered during the investigation did not corroborate that you made such comments. As a result a violation of the *State Policy* **could not** be substantiated. However, the investigation did obtain corroborating statements that you have referred to homosexual males and females in a derogatory manner. Affectional or Sexual Orientation is defined as male or female heterosexuality, homosexuality or bisexuality by inclination, practice, indemnity or expression, having a history thereof or being perceived presumed or identified by others as having such an orientation. Given the corroborating

statements, **a violation** of Section II. Prohibited Conduct (a.) of the *State Policy* on the basis of affectional or sexual orientation has been substantiated. Consequently, a recommendation for appropriate administrative action has been forwarded to the Department of the Treasury's Human Resources. You will be advised of the determination.

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,

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Esq.
EEO/AA Officer

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