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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of J.J., Department of
Transportation

CSC Docket No. 2015-111

Discrimination Appeal

ISSUED: **NOV 21 2014** (SLK)

J.J., a management-level employee¹ with the Department of Transportation (DOT), appeals the attached decision of the Division of Civil Rights & Affirmative Action (DCR/AA), which found that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the DCR/AA investigated allegations by E.H., an Executive Assistant 1, that the appellant discriminated against him on the basis of religion. Specifically, E.H. alleged that during his Performance Assessment Review (PAR) review meeting, the appellant used a metaphor to explain the rating system that a "3 rating was reserved for Jesus Christ, 2 rating for St. Peter, and a 1 rating for Satan." The investigation revealed that the appellant admitted to making the statement, but asserted that she was not implying that E.H. was Satan nor was it intended to disparage his religion or any other religion. In its June 18, 2014 determination, the DCR/AA found that the use of the religious metaphor during the PAR meeting violated the State Policy and as a result, it counseled the appellant. However, the DCR/AA was unable to substantiate a violation concerning Christmas decorations in the workplace.

On appeal, the appellant contends that no reasonable person could have construed her statement to be derogatory or demeaning toward a particular religion or individual person. Rather, the appellant contends that the metaphor was a negative assessment of the PAR system, which is inanimate and has no religion. She argues that the determination that she violated the State Policy violates her

¹ The appellant's exact title is not being used in this decision in order to preserve confidentiality. See N.J.A.C. 4A:7-3.1(g)1.

free speech rights and underscores that she was advised by the DCR/AA that she is not entitled to see the investigation report. The appellant asserts that under *N.J.A.C. 4A:2-1.1(d)*, she has the right to review the record since she bears the burden of proof in this matter and that her inability to access the complete record violates her common law and federal and State Constitutional rights to substantive and procedural due process. The appellant further argues that her rights were violated when she was denied access to her own statement and claims that this is particularly significant because she repeatedly expressed concern that the transcription of her responses was incomplete and inaccurate. She also maintains that the DCR/AA refused to accept for consideration a copy of the PAR that she was describing on the date that she used the religious metaphor as, had it accepted the document, it would be evident that E.H. did not receive any low "1" ratings. Therefore, the appellant requests access to the complete record upon which the determination was rendered. She further requests that the determination that she violated the State Policy based on her October 2012 use of a metaphor be reversed.

In response, the DCR/AA explains that E.H. received a Preliminary Notice of Disciplinary Action (PNDA) on March 14, 2014 for neglect of duty and insubordination. In response, E.H., through his letter dated March 18, 2014, made religious discrimination allegations against the appellant. Since E.H.'s letter also included claims that he had been subjected to discrimination, a copy was forwarded to the DCR/AA on April 4, 2014 for an investigation. Specifically, E.H.'s letter indicated that during his PAR review meeting, the appellant expressed her displeasure with the rating system and said that if "a 3 was reserved for Jesus Christ, a 2 was reserved for St. Peter, then a 1, because of the deficiency drop off, must be reserved for Satan." E.H. is of the Jewish faith and indicated that this statement made him uncomfortable. In addition, E.H. expressed his discomfort when the appellant asked him whether or not a crèche displayed in the office bothered him during the holiday season of 2012. DCR/AA commenced an investigation that included an interview with the appellant who admitted that she made the comment. The appellant emphasized that she was not implying that E.H. was Satan.² The appellant also indicated during the investigation that she had concerns about E.H.'s work performance. However, she stated that she felt locked into giving him a 1 or a 2 rating when his work performance was not at those levels, but it did not warrant a rating of 3. During the interview, the appellant expressed that she was just frustrated with the numerical rating system she was required to use on the performance evaluation. Further, the appellant denied ever treating E.H. differently because of his Jewish beliefs, described her office as religiously diverse and made every effort to ensure that there was a balanced representation of the winter holiday celebrations. Additionally, several witnesses during the

² The DCR/AA notes that J.J. had the opportunity to carefully review and modify her statement to ensure that the information presented accurately reflected her response before she signed the final version.

investigation affirmed that the holiday decorations represented the Christian faith, Hanukkah, and Kwanzaa and that E.H. never mentioned to any of the witnesses that he was uncomfortable with the holiday decorations.

The appellant, despite being provided the opportunity, did not reply to the DCR/AA's response.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, that under the State Policy, discrimination or harassment based upon religion is prohibited. Further, under *N.J.A.C. 4A:7-3.1*, it is a violation of the State Policy to use a derogatory or demeaning reference regarding religion. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

The Commission has conducted a review of the record in this matter and finds that the appellant has not violated the State Policy. The appellant admitted that during the PAR meeting with E.H. she made the comment that a "3 rating was reserved for Jesus Christ, 2 rating for St. Peter., and a 1 rating for Satan." However, the statement was made to simply serve as an analogy in order to describe the PAR rating system. The comment was not derogatory on its face to any particular religious affiliation nor was it a demeaning reference directed to E.H. Rather, the appellant utilized the reference in order to illustrate her concern that the three-level PAR rating scale is too imprecise and may not accurately reflect an employee's performance. In other words, the appellant used the analogy to express her frustration with the three-tier PAR system, *not* as a demeaning reference to either the appellant or any particular religious affiliation. Indeed, the fact that she utilized a religious analogy is not necessarily a *per se* violation of the State Policy. Thus, the appellant's use of the reference in the context of this particular situation is not a violation of the State Policy. *See In the Matter of L.S., Department of Children and Families* (CSC, decided February 16, 2011). (Commission ordered personnel record of appellant to be corrected to reflect the finding that the allegation had not been substantiated since appellant was not referring to religion in a derogatory or demeaning manner). *See also In the Matter of A.M.* (CSC, decided August 27, 2008) (Commission determined that "Jesus Christmas" did not violate the State Policy, but was solely an expression of an individual's frustration with the appellant).

While using a religious analogy to describe the PAR rating system in a setting where a supervisor was evaluating a subordinate may be unprofessional, the appellant's statement on its face or in the context of this particular situation was not referring to any particular religion or E.H. in a derogatory or demeaning manner in violation of State Policy. Further, a statement that is merely unprofessional or inappropriate does not always implicate the State Policy.

Accordingly, the appellant's personnel record shall be corrected to reflect the Commission's finding that the appellant did not violate the State Policy. However, the Commission emphasizes that the appellant is a supervisor and it was inappropriate for her to use a religious analogy to express her concerns with respect to the PAR rating system. Therefore, the appellant's counseling was proper under the circumstances.

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's personnel record be corrected to reflect the finding that the allegation that she 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 19th DAY OF NOVEMBER, 2014**



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and
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Attachment

**c: J.J.
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