

B-154



STATE OF NEW JERSEY
DECISION
OF THE
CIVIL SERVICE COMMISSION

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

CSC Docket No. 2015-1737

Discrimination Appeal

ISSUED: FEB 09 2015 (SLK)

M.W., a Communications Operator, Secured Facilities (Operator) with the Department of Corrections (DOC), appeals the attached decision of the Assistant Director of the Equal Employment Division (EED) of the DOC which did not substantiate that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the appellant alleged that an individual unknown to her at Bayside State Prison (BSP) sexually harassed and retaliated against her and that M.S., an Operator, breached the confidentiality provisions of the State Policy. Specifically, on June 10, 2014, the appellant filed a complaint alleging several incidents of workplace harassment and intimidation by C.E.¹, a Correction Lieutenant (Lieutenant) and Operator S.T. The appellant claimed that derogatory notes were left on her computer that called her a "Snitch" and stated "You'll Get Yours," that she received a picture in interoffice mail with the caption "Never Rat On Your Friends And Always Keep Your Mouth Shut," and that she received another interoffice envelope addressed to "Operator Snitch" which contained a note that said something to the effect of "told you, snitch" in reference to Lieutenant C.E. being cleared to return to his post. Additionally, she maintained that several other Operators initiated a letter campaign against her in order to increase workplace hostility, ostracized her, and pushed others to be hostile to her with respect to the performance of her duties as Shop Steward. Further, the appellant asserted that her request to use "Emergency Compensatory Time" was denied and her absence

¹ It is noted that Lieutenant C.E. retired effective November 1, 2014.

was recorded as "sick," which resulted in her being disciplined for chronic or excessive absenteeism and failure to follow call-off/call-on procedures. The appellant argued that this was discriminatory and retaliatory because other employees who actually failed to follow proper call-off procedures were not disciplined. Moreover, the appellant indicated that an anonymous letter was sent to K.S., a Correction Major, and to E.N., the EED Liaison (Liaison) for BSP, which detailed several complaints against her and several semi-nude photographs of her. Finally, the appellant requested that this agency's Division of Equal Employment Opportunity/Affirmative Action (EEO/AA) conduct the investigation due to a possible conflict of interest.

In response to her request for another agency to conduct the investigation, the EEO/AA determined that the appellant's complaint did not present a conflict of interest pursuant to *N.J.A.C. 4A:7-3.2(e)* and the EED would conduct the investigation. Thereafter, the EED conducted an investigation of the appellant's complaint that only touched on issues regarding the State Policy. The investigation revealed that the photographs, while sexual in nature, were not disseminated throughout the facility. Rather, they were provided to E.N. as part of an anonymous complaint package that made allegations against the appellant. Therefore, it determined that the package was not a form of sexual harassment. Additionally, the investigation was unable to confirm that M.S. breached the confidentiality provisions of the State Policy by discussing his pending EED interview. Moreover, the appellant's claim of retaliation could not be substantiated because there was no evidence that she was ever a complainant, respondent, or witness in a prior EED investigation.

On appeal, the appellant states that pictures of herself and anonymous letters were sent within BSP with the sole purpose of defaming her character and undermining the authority of K.S. The appellant indicates that these letters and photos were distributed within BSP and mailed to the Special Investigations Division (SID) and K.S.' personal residence. She maintains that the letter is merely one of a series of notes and letters that have been distributed to BSP staff over an extended period of time in order to harass, berate, and slander her. The appellant contends that E.N. compromised the investigation by opening unmarked mail without wearing gloves, which is a violation of BSP policy. Further, she states that SID informed her that BSP staff members were taking photos of her residence and sending them to SID. Additionally, the appellant contends that her request to be interviewed outside of BSP was denied and she claims that she was able to hear the conversations occurring in the rooms around her during interview with the EED. Additionally, when she presented the EED Investigator with a binder filled with additional documentation related to finding the persons responsible for the continued harassment, including threats which she received both before and after the photographs were sent, the Investigator dismissed this evidence, noting that the sole reason she was there was to ask about the photos and to ask if she felt

"sexually harassed" by E.N. However, the appellant explains that she had several credible leads into specific persons who were directly involved in these incidents that were not investigated. For example, she is aware of a witness who had a conversation with M.S. which placed the photos in question in his possession; however, the Investigator informed her that her comments were hearsay. The appellant asserts that if the witness had been interviewed, the witness' direct knowledge would not be hearsay. The appellant also claims that C.E. has continued to retaliate against her since reporting the incident that involved himself and S.T. The appellant maintains that C.E. was never disciplined for filing false charges against her and that S.T. was never disciplined and continues to act unprofessionally towards her and continues to encourage others to do the same. The appellant requests further investigation into the "group efforts" against her by various BSP staff.

In reply, the EED summarizes that the appellant's appeal is based on: (1) her complaint that several individuals sent semi-nude photographs of her and inappropriate letters regarding her; (2) the photographs and letters were utilized using State resources; (3) the recent mailings were just the latest in a series of harassing letters; (4) E.N. violated policy when she mishandled the anonymous package by opening it without wearing gloves; (5) she was advised that staff took pictures of her personal residence; (6) the EED Investigator was not interested in her evidence and was only interested in her claim of sexual harassment; (7) her request to be interviewed outside of BSP was denied; and (8) the EED did not investigate the identity of the sender of the anonymous package. The EED reiterates that E.N. received an anonymous package containing semi-nude photos of the appellant and alleging that she was receiving favorable treatment from K.S. at BSP. The package was also mailed to K.S.'s home. The appellant filed a complaint with the EED that named several individuals whom she claimed were "harassing" her on an ongoing basis. However, the EED only investigated the allegations regarding the photographs as this was the only allegation that touched the State Policy. The EED provides that all other non-EED allegations were properly forwarded to the SID or BSP Administration. The EED states that its investigation included interviews with witnesses and a review of the evidence pertinent to the allegation of gender harassment. However, it did not find any evidence to corroborate the specific individuals who were responsible for copying and disseminating the photographs. The EED notes that the photographs were mailed to E.N. and the home of K.S. It asserts that K.S.'s home is not an extension of the workplace and therefore it properly determined that there was no violation of the State Policy. With respect to the claim that it did not fully investigate the matter to ascertain the identity of the individuals responsible for the aforementioned package, it presents that the EED does not handle investigations involving fingerprinting and mail tracking and therefore this matter was properly sent to the SID for investigation.

In reply, the appellant maintains that the EED's investigation was biased, incomplete, unprofessional, and covered up by high ranking DOC staff. The appellant represents that E.N. is married to a Custody Supervisor, Correction Lieutenant T.N., assigned to South Woods State prison. The appellant claims that T.N. is personal friends with high ranking staff members at BSP who may have been involved in this incident. Therefore, the appellant contends that there was a conflict of interest when E.N. was presented with evidence that C.E. was clearly retaliating against her with false disciplinary charges and she did nothing. The appellant asserts that her claim that C.E. fabricated charges against her in retaliation for her initial report to K.S. could be confirmed by K.S. if there was a proper investigation. The appellant reiterates that she never received favorable treatment from K.S. and at no time was she ever personally or sexually involved with him and she is humiliated and disgusted that she could be accused of such acts. The appellant presents that the photographs in question were taken by her ex-husband and that a proper investigation would have confirmed this. The appellant also asserts that the SID Investigator at BSP intimidated and harassed her, was unprofessional, and that he had no intention of properly investigating this matter.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that the State of New Jersey is committed to providing every State employee with a work environment free from prohibited discrimination or harassment.

N.J.A.C. 4A:7-3.1(a) provides that the State Policy also applies to both conduct that occurs in the workplace and conduct that occurs at any location which can be reasonably regarded as an extension of the workplace.

N.J.A.C. 4A:7-3.1(c) provides that it is a violation of the State Policy to engage in sexual harassment of any kind.

N.J.A.C. 4A:7-3.2(i) provides that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place. All investigations of discrimination/harassment claims shall be conducted in a way that respects, to the extent possible, the privacy of all persons involved.

N.J.A.C. 4A:7-3-2(m)3 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

Initially, the appellant states that she asked the Investigator to conduct the interview with her at an off-site location and her request was denied. Additionally, the appellant states that during her interview, she could hear the conversations of

other individuals through the walls and the Investigator was not concerned that others might be able to hear their private conversation. Although the EED has not disputed this claim, the appellant has not presented any evidence that the substance of her interview was overheard by any specific individual or that the confidentiality of her interview was breached in any way. Thus, the appellant's mere allegation that she could hear the conversations of other individuals through the walls, by itself, does not substantiate a violation of the confidentiality provision of the State Policy. Nevertheless, in the future, if an appellant expresses concerns regarding the privacy of the interview, the investigator should take all reasonable steps, if possible, to ameliorate these concerns, such as moving the interview and conducting it in a different office to ensure privacy.

Additionally, as correctly determined by the EED, the majority of the appellant's claims do not implicate the State Policy. For example, the appellant's claim that C.E. and S.T. retaliated against her for filing a report with K.S. criticizing C.E.'s and S.T.'s behavior is not a violation of State Policy as the asserted retaliation was not in response to her participation in a State Policy investigation. Instead, the appellant can file a grievance under the appointing authority's procedures, union procedures, if applicable, or other appropriate forum. Only claims of sexual harassment, derogatory or harassing treatment due to the appellant being in a protected class as outlined in *N.J.A.C. 4A:7-3.1* or retaliation for filing a prior claim with the EED are violations of the State Policy and within the EED's jurisdiction for investigation. However, as further explained below, the individuals the appellant asserts who may have engaged in harassing or retaliatory conduct that did not touch the State Policy appear to be the same ones that the appellant contends are responsible for sending the aforementioned anonymous packages, which does implicate the State Policy.

The Civil Service Commission (Commission) is unable to determine if the EED conducted an adequate investigation when it found that it was unable to substantiate a violation of the State Policy. The investigation revealed that an anonymous package containing semi-nude photographs of the appellant and a letter containing allegations that she was having an improper relationship and receiving favorable treatment from K.S. were sent to E.N. at BSP and K.S.'s residence. The introduction of these photographs in the workplace clearly implicates the State Policy. However, it is unclear if the EED interviewed all of the witnesses referenced by the appellant in her initial complaint. In her appeal, the appellant states that she has "several credible leads into the specific person(s) directly involved in these incidents." Further, she claims that she has "a witness who had a conversation with M.S. which placed the photos in his possession and/or knowledge;" however, this witness was not interviewed. In this regard, it is clear from the appellant's submissions that she listed P.D., Operator, in her initial complaint to the EED as a possible witness. Moreover, in the supporting documentation submitted with her appeal to the Commission, the appellant

provides a copy of a report she submitted explaining why she felt P.D. may have relevant information regarding the semi-nude photographs. The EED does not provide any explanation as to why this specific witness was not interviewed or why any of the other potential "credible leads" were not interviewed. Additionally, in reference to the anonymous package sent to K.S., as stated in a companion case decided by the Commission at today's meeting, the EED does have jurisdiction in that matter to conduct an investigation. *See In the Matter of K.S.* (CSC, decided February 4, 2015). As such, these witnesses should be interviewed as part of a complete investigation.

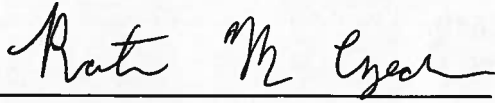
With respect to the appellant's complaint that there was a breach of confidentiality by M.S., the Commission sustains the EED's determination that it was unable to confirm this allegation as M.S. denied discussing any matters pertaining to the EED investigation and the appellant has not offered any other witnesses who should have been interviewed or any other item that should have been investigated regarding this allegation, but were not. The Commission also sustains the EED's determination that there was not any retaliation that violated the State Policy as the appellant has not alleged that anyone has retaliated against her for filing a prior complaint with the EED. As stated above, the various acts of "retaliation" that M.W. alleges are grievances which do not touch the State Policy and are outside the jurisdiction of the EED. Further, the appellant's claim that E.N. did not follow policy when she opened the anonymous package without gloves does not implicate the State Policy and should be addressed by the appropriate grievance procedures. In regard to M.W.'s statement that the EED has a conflict of interest and should not be conducting the investigation, the mere fact that E.N. may be married to an individual who may have high-ranking friends at BSP does not establish a conflict of interest. As M.W. has not presented an actual conflict by the EED, it was the appropriate body to conduct the investigation.

Accordingly, this matter is remanded to the DOC's EED to conduct a complete investigation regarding the anonymous packages sent to E.N. and K.S. Moreover, the Commission orders that the investigation be completed and a determination issued within 90 days of the date of this decision. Should an adverse determination be issued, the appellant shall be provided with a right to appeal.

ORDER

Therefore, it is ordered that this appeal be granted in part with respect to the packages sent to E.N. and K.S. and that matter be remanded to the Department of Corrections' Equal Employment Division to conduct an investigation consistent with this decision. Additionally, it is ordered that the investigation be completed and a determination be issued within 90 days from the issuance of this decision.

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF FEBRUARY, 2015**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
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and Regulatory Affairs
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Trenton, New Jersey 08625-0312**

Attachment

**c: M.W.
Victoria Kuhn
Leila Lawrence
Mamta Patel
Joseph Gambino**



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

November 5, 2014

M [REDACTED] W [REDACTED]
[Mailed to Home Address]

Dear Ms. W [REDACTED]


The Department of Corrections Equal Employment Division ("EED") has completed its investigation into allegations that you have been subjected to sexual harassment and retaliation, and the allegation of breach of confidentiality by Communications Operator M [REDACTED] S [REDACTED] (hereinafter "Mr. S [REDACTED]"). Specifically, you allege that on or about July 14, 2014, Assistant Superintendent E [REDACTED] N [REDACTED] the EED Liaison for Bayside State Prison, received a complaint package from an anonymous sender. Said package contained a letter detailing several complaints against you, along with photocopies of several photographs of you in a semi-nude state. Accordingly, Assistant Superintendent N [REDACTED] properly forwarded the package to the EED and the Department's Special Investigations Division for review. Please be advised that the EED investigation did not substantiate a violation of the *Policy Prohibiting Discrimination in the Workplace*.

Please be further advised that the Department of Corrections takes all allegations of discrimination/harassment and retaliation seriously and such conduct will not be tolerated. Please note that the investigation only addressed those issues which touched the *Policy*. An investigation into this matter revealed that the photographs, while sexual in nature, were not disseminated throughout the facility. Rather, they were provided to the Assistant Superintendent Liaison as part of an anonymous complaint package involving allegations against you. As such, the package is not a form of sexual harassment against you. Further, with regard to the allegation that Mr. S [REDACTED] breached confidentiality by discussing with staff his pending interview with the EED Investigator, the investigation did not confirm this allegation. Mr. S [REDACTED] was interviewed and denies discussing any matters pertaining to the EED investigation. Finally, please be advised that in order to establish the claim of retaliation there must be a prior EED history between you and the respondent(s) as a complainant, respondent or witness. As there is no known respondent, the claim of retaliation could not be established.

If you wish to appeal this determination, you must submit a written appeal to the New Jersey Civil Service Commission, Division of Merit System Practices & Labor Relations, Written Record Appeals Unit, P.O. Box 312, Trenton, New Jersey 08625-0312, postmarked or delivered within twenty (20) days of your receipt of this determination. The burden of proof is on the Appellant. Your appeal must include a copy of this determination, the reason for the appeal and the specific relief requested. Please be advised that pursuant to P.L. 2010, c. 26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include a check or money order along with your appeal, payable to NJCSC. Persons receiving public assistance and those qualifying for NJCSC Veterans Preference are exempt from this fee.

At this time, the EED also reminds you that the *Policy Prohibiting Discrimination in the Workplace* prohibits retaliation against any employee who files a discrimination complaint or participates in a complaint investigation or opposes a discriminatory practice. Furthermore, this matter remains confidential and the results of the investigation must not be discussed with others.

Sincerely,


 Leila Lawrence, Esq., Assistant Director
 Equal Employment Division
 Office of Legal & Regulatory Affairs

APPROVED:


 Gary M. Lanigan
 Commissioner

c: E N Assistant Superintendent/ASL

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