

B-30



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of K.E.,
Department of Human Services

CSC Docket No. 2014-407

Discrimination Appeal

ISSUED: APR 07 2015 (DASV)

K.E., a Chaplain with Greystone Park Psychiatric Hospital, Department of Human Services (DHS), appeals the attached determination of the former Chief of Staff of DHS, stating that the appelland failed to present sufficient evidence to support a finding that he had been subjected to additional violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appelland, an African-American male, filed a complaint alleging discrimination and retaliation by E.H., a Supervisor of Chaplaincy Services. E.H. is a Caucasian female. As indicated in the attached determination, the appelland claimed various incidences of discrimination based on his race, national origin, gender, and religion. In response, the appointing authority conducted an investigation, which included interviewing five employees and reviewing 15 documents. The appelland's first allegation was substantiated,¹ but his other allegations could not be substantiated since they were not corroborated or the incidents did not violate the State Policy.

On appeal to the Civil Service Commission (Commission), the appelland disagrees with the appointing authority's determination. He argues that the investigation was erroneous since his allegations as written in the determination do not reflect "exactly" his statements and many of the documents he submitted were

¹ It is noted that E.H. filed an appeal regarding her statement that the reason for the appelland's insubordination was due to his "African culture." However, the Civil Service Commission denied the appeal. See *In the Matter of E.H.* (CSC, decided April 1, 2015).

not mentioned. Further, he contends that not all of the witnesses he identified were interviewed. Additionally, he states that it was not explained "why" E.H. was found guilty of allegation 1, "thereby offering an interpretation of insufficient evidence." As for his other allegations, the appellant asserts that E.H. failed to report two female Chaplains who had anointed a patient against hospital policy. However, E.H. reported the appellant for doing the same thing in order to get him fired. As proof, the appellant states that no incident report had been filed regarding the female Chaplains, but medical records indicate that patients informed E.H. of the actions of the female Chaplains. Further, the appellant asserts that E.H. wanted to show that he was proselytizing in order to fire him. E.H. apparently used a note from a male Chaplain to sustain her accusation. The appellant disputes that the note was about him and alleges that E.H. coerced the Chaplain "to quickly write it" so that E.H. could present it against the appellant at a meeting. Moreover, the appellant and one of the female Chaplains received an email from E.H., indicating that he was absent for a meeting without notice, while the female Chaplain was also absent but provided notice. The appellant argues that E.H. was trying to establish proof that the appellant was insubordinate "because of [him] being [an] African male." In response to the female Chaplain's inquiry about the email, E.H. apologized to her, replying that the email should not have been sent. E.H., however, did not apologize to the appellant. In addition, E.H. referred to the appellant as the "black Chaplain" to distinguish him "from other races." E.H. also contacted the appellant's former employer to verify "her facts." The appellant maintains that E.H. continues "to verbalize this idea, thereby harassing and causing torment and emotional pain" which "should eventually lead to low performance and dismissal or voluntary resignation." Furthermore, E.H. insulates herself from being investigated by being the chair of the Ethics Committee. Additionally, the appellant claims that he was not issued a Pastoral Department Handbook until he requested one, even though E.H. has issued handbooks to other employees. The appellant indicates that his handbook looks "structurally different from those of [his] colleagues."

Moreover, the appellant claims that in staff meetings in 2010 and early 2011, E.H. would single him out by cautioning him against proselytization and stating "E[.] take note." He asserts that E.H. thinks he is "too Christian . . . when she also verbalized that she does not 'even believe Jesus is the Christ.'" Further, the appellant maintains that in reassigning him to another floor, E.H. retaliated against him. The appellant sets forth a timeline of events regarding his reassignment. Moreover, the appellant contends that E.H. continued to change his work schedule even though she no longer had "jurisdiction to supervise" him and she did not contact his supervisor about the changes. In addition, the appellant maintains that E.H. asked patients if they liked him by asking whether they liked the "black Chaplain." In support of the foregoing, the appellant provides the names of two witnesses, whom he refers to as patients, and claims that they were not interviewed. It is noted that the determination indicated that the appellant was

unable to provide witnesses in that regard. The appellant also asserts that E.H. breached the confidentiality clause of the State Policy by telling one of the female Chaplains that an investigator was going to interview her and ask her opinion of the case. He questions the Chaplain's failure to recollect that this happened. The appellant also notes that the determination mentioned two female Chaplains, but he only reported one of the Chaplains. In addition, he contends that one of the female Chaplains advised him that E.H. asked her to sign a prepared document concerning his case, which was similar to a document she had signed earlier. The appellant requests verification of the discussions between E.H. and this Chaplain and to investigate the extent that confidentiality was violated.

Additionally, the appellant indicates that the appointing authority did not complete its investigation within 120 days and "the resulting report might have been hastily written." He notes that the appointing authority received his complaint on January 30, 2013, but it did not issue a determination until July 31, 2013. The appellant contends that he was not provided with notice of an extension. Thus, he concludes that the investigation of his complaint was "not properly done." In support of his appeal, the appellant submits information regarding his duties and responsibilities; his change of group assignments made by E.H.; and letters and emails he sent to the investigator of his complaint. The appellant also presents a list of the differences and similarities he believes exists between his status as a State employee and a female Chaplain, who is a "Contract or Part Time Chaplain." The appellant claims that E.H. has often stated that the latter is not a State employee nor is she a member of a union and that is why she is treated differently. In addition, the appellant reiterates his initial responses to the findings of the investigation and adds that he did not say that E.H. does not "reprimand/report." Rather, he clarifies that E.H. discriminates while reporting. Further, regarding E.H. disciplining Caucasian males for their work performance, the appellant replies that the instant matter is "not a case about performance but a case about discrimination." The appellant also disputes that he received a written warning for anointing a patient as indicated in the determination. In addition, the appellant claims that E.H. "is using a certain policy of 01/13/13 which [he does not] have and which is not authorized. To add to this, she had sent out yet another new policy on 05/29/13 to employees and [he does not] have a copy. To pursue the case of [him] anointing a patient on 01/14/13 she used an unacceptable policy which was rejected by the investigation." Additionally, he notes that when he was on leave, E.H. assigned a female Chaplain to his spiritual groups. However, when he returned, the Chaplain continued to be assigned to his groups for two weeks. The appellant maintains that E.H.'s "motive is to cause frustration and emotional torture on [him] as much as possible for reporting the case of discrimination against her."

For his remedy, the appellant requests that E.H. not supervise him again; he be returned to his former work area; and "compensation of \$100,000.00 for emotional torture, harassment, and pain that has caused [the appellant] to suffer

from continuous Insomnia, severe body pains, night fevers." He also asserts that his job performance, as reflected in his Performance Assessment Review, and his home life has been seriously affected by E.H.'s ongoing harassment and retaliation. The appellant states that he is "readily irritated" and "quickly angered" and "not [as] friendly as before."

In response, the appointing authority relies on its July 31, 2013 determination, indicating that it provided the appellant with detailed explanations of its conclusions. However, it notes that allegation 1 was substantiated against E.H., and it is unnecessary for it to further explain to the appellant, as the complainant, as to why the claim was sustained. Furthermore, although the appellant contends that the determination does not reflect "his exact words," the appointing authority explains that his allegations "were framed as the best possible rendering of the appellant's issues as they relate to the" State Policy. Moreover, it replies that contrary to the appellant's assertions, all material submitted in the investigation was "subjected to close scrutiny and evaluation." Further, the appointing authority indicates that all relevant witnesses were interviewed. Regarding the timeliness of the investigation, the appointing authority states that it took the necessary time to conduct the investigation. It disputes that the investigation report was hastily written. On the contrary, the appointing authority maintains that the investigation was thorough and its findings are correct.

CONCLUSION

Initially, the appellant complains that the appointing authority did not issue its determination in a timely manner. In this regard, *N.J.A.C.* 4A:7-3.2(l)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C.* 4A:7-3.2(l)3 states that the time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of Equal Employment Opportunity/Affirmative Action and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension. In the present case, the appellant states that the appointing authority received his complaint on January 30, 2013, but it did not issue a determination until July 31, 2013. Further, he did not receive a notice of extension, which the appointing authority does not dispute. Although the investigation and the time of issuance of the determination did indeed exceed the 120-day time frame, the appointing authority states that it needed the time in order to conduct the investigation. Nonetheless, the Commission reminds the appointing authority that it must comply with the regulations, which include issuing a written notice of extension, and if it fails to do so in the future and egregious violations occur, it may be subject to fines and penalties pursuant to *N.J.A.C.* 4A:10-2.1(a)2. The Commission notes there is no provision in the State Policy mandating that the

appellant's complaint be upheld if procedural requirements are not fulfilled. See e.g., *In the Matter of Karen Kritz* (MSB, decided January 25, 2006).

With regard to the merits of the appellant's appeal, *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, *N.J.A.C.* 4A:7-3.1(j) establishes that all discrimination complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process. In the course of the investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment. Finally, the appellant shall have the burden of proof in all discrimination appeals. See *N.J.A.C.* 4A:7-3.2(m)4.

The Commission has reviewed this matter and finds that it is necessary to remand an allegation to the appointing authority for investigation. The appellant presents what appears to be a new allegation of a breach of confidentiality. The appellant asserts that one of the female Chaplains advised him that E.H. asked her to sign a prepared document concerning his case, which was similar to a document she had signed earlier. Without more information as to the contents of this document and what transpired between E.H. and the female Chaplain, the Commission is unable to determine whether a violation has occurred.

Regarding the appellant's other allegations, except for the findings of allegation 1, no evidence or corroborating statement was uncovered to demonstrate that the appellant was subjected to discrimination or retaliation in violation of the

State Policy. Thus, the appellant's appeal must be denied. The Commission notes that the appointing authority conducted an adequate investigation, which included interviewing relevant witnesses and reviewing pertinent documents. While the appellant presents very detailed arguments on appeal regarding his other allegations, his disagreement with the appointing authority's conclusions is not sufficient to find a violation of the State Policy. Moreover, the appellant identifies two witnesses whom he claims were not interviewed and who would substantiate that E.H. asked them if they liked the appellant by asking whether they liked the "black Chaplain." However, even if E.H. made the statement, it is not discriminatory on its face. Without more evidence of a discriminatory context, the phrase merely identifies the appellant. Thus, pursuant to *N.J.A.C. 4A:7-3.2(m)4*, the appellant has not satisfied his burden of proof.

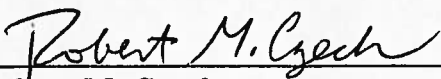
Therefore, while the appellant's appeal is denied, the issue of the alleged breach of confidentiality is remanded to the appointing authority for review. The appointing authority shall issue a new determination on that issue, with applicable appeal rights to the parties, within 60 days of issuance of this decision. As for the appellant's remaining allegations, no basis exists to find a violation of the State Policy.

ORDER

Therefore, it is ordered that this appeal be denied, but the matter be remanded to the appointing authority for review of the alleged breach of confidentiality. A determination shall be issued by the appointing authority within 60 days of issuance of this decision.

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 1ST DAY OF APRIL, 2015



Robert M. Czech
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312**

Attachment

**c: K.E.
Edward McCabe
Mamta Patel
Joseph Gambino**