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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of S.L., Department of
Human Services

Discrimination Appeal

CSC Docket No. 2014-2379

ISSUED: APR 17 2015 (HS)

S.L., a Supervising Medical Security Officer with Ann Klein Forensic Center, Department of Human Services (DHS), appeals the attached determination of the Chief of Staff, which found sufficient evidence that the appellant had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The complainant, a female Senior Medical Security Officer, filed a complaint with the Office of Equal Employment Opportunity (EEO) against M.B., a male Senior Medical Security Officer, and the appellant, also male, alleging gender discrimination and sexual harassment. The complainant alleged that M.B. played a pornographic DVD for patients and that the appellant told her to destroy the DVD. After an investigation was conducted, the EEO determined that the appellant violated the State Policy. The EEO determined that the appellant had improperly instructed the complainant to destroy the DVD that was the subject of her complaint. Specifically, the EEO indicated that the appellant admitted that he had told the complainant to destroy the DVD and claimed he did so because of his inability to establish a chain of custody for the DVD. The complainant refused to destroy the DVD, over which the EEO later obtained possession. The EEO stated that there was no legitimate rule of evidence that would compel the DVD's destruction and that the appellant lacked the authority to order the destruction of any evidence in a potential EEO matter. The EEO further indicated that the appellant admitted that the complainant told him that M.B. had been playing a pornographic video. Finally, the EEO noted that the appellant was acting as a

supervisor at the time and that he had a duty to preserve any evidence. As a result, the EEO referred the matter for appropriate administrative action.¹

On appeal to the Civil Service Commission (Commission), the appellant initially questions the credibility of the complainant. Specifically, the appellant claims that the complainant was the subject of a substance abuse inquiry after the incident at issue here and that she was terminated.² Turning to the specific incident at issue, the appellant argues that the complainant left her work station to retrieve the DVD, creating a danger to patients and staff and preventing the appellant from establishing a chain of custody since the other parties denied the incident. Additionally, the appellant disputes the authenticity of the DVD and contends that there is no way to ascertain that it was ever played in the unit. In this regard, the appellant states that the complainant left the building with the DVD and waited several days to present it to the appropriate authority instead of relinquishing it to the appellant or another on-duty supervisor. Finally, the appellant invokes the Conscientious Employee Protection Act (CEPA)³ and argues that the EEO's determination was issued in retaliation for his complaint under the Public Employees Occupational Safety and Health (PEOSH) Program. Specifically, the appellant notes that the EEO's determination was issued nearly five years after the complainant filed her complaint and argues that the determination was issued weeks after he initiated his PEOSH complaint, which he states has shown some infractions. The appellant submits a copy of his original report of the incident, dated June 13, 2009. In that report, the appellant wrote that the complainant told him that a "porno" had been playing and that she believed sexual harassment had occurred. He wrote that he could not conclude to whom the DVD belonged, and since the DVD was unmarked and in the possession of the complainant, no chain of custody could be determined. The appellant further wrote that his "advice to [the complainant] was to discard the DVD, as it was considered contraband."

In response, the EEO contends that the appellant lacked both the authority to order the destruction of any evidence in a potential EEO matter and the knowledge to make a decision regarding the authenticity of the DVD as evidence. Rather, as a supervisor, the appellant had a duty to report the complainant's allegations and preserve any evidence. It argues that the EEO has more training and experience regarding evidence than does the appellant and that it has the resources of its Legal Specialist and the department's Legal and Regulatory Affairs Office to draw upon. The EEO also notes that M.B. admitted during the investigation that the DVD in the EEO's possession was in fact the DVD he had

¹ The appointing authority issued a written warning based on the results of the EEO's investigation.

² Agency records reflect that the complainant entered into a settlement agreement which included a six-month suspension.

³ CEPA, *N.J.S.A.* 34:19-1, *et seq.*, is an act to protect employees from retaliatory action by employers. While the Commission does not have jurisdiction to enforce CEPA, reprisal actions are prohibited under Commission regulations. *See N.J.A.C.* 4A:2-5.1(a).

played for patients and staff. The allegations against M.B. were, however, not substantiated.

Regarding the timing of the issuance of its determination, the EEO explains generally that the number of employees in its office fell from 24 in 2003 to four in 2012, and that the backlog of cases increased until it reached several hundred cases by February 2012. The EEO states that DHS consisted of over 15,000 employees and investigative and case management techniques were not as efficient as they are at present. More specifically, the EEO explains that this particular matter was initially assigned to an investigator, who conducted five interviews in June and July of 2009 and then left employment with DHS. The case was not reassigned until February 2012. At that time, the EEO had only two investigators, and one passed away. The EEO advises that it has undertaken a massive effort since February 2012 to resolve the backlog of cases by hiring new investigators, training them and closing 786 cases between February 2012 and today. This particular case was reviewed as part of that effort and reassigned to another investigator who conducted two additional interviews and reviewed new documents. A report of the matter was completed in March 2014 encompassing the work of both investigators who had been assigned to the matter. The EEO avers that although this case was opened years ago, the appellant was clearly in violation of the State Policy for admittedly attempting to destroy evidence in an EEO case. The EEO denies that its determination was timed to retaliate against the appellant for his PEOSH complaint and states that it had no knowledge of, or interest in, the PEOSH complaint. Finally, the EEO advises that it now has five investigators, with a sixth investigator in the process of being terminated, and is hiring two temporary employees. The EEO explains that since February 2012, it has been submitting far more cases per month than it has been opening, thus shrinking the backlog.

In reply, the appellant argues that he has been prejudiced by the delay in the issuance of the determination letter. Although the appellant reiterates his view that the determination was timed to retaliate for his PEOSH complaint, he also notes that the timing could be purely coincidental. The appellant denies that he attempted to destroy the DVD and notes that the DVD was never in his possession. He points out that in his original report of the incident dated June 13, 2009, he wrote that his "advice to [the complainant] was to discard the DVD, as it was considered contraband." The appellant argues that since the DVD was only ever seen in the complainant's possession, his only option was to conclude it belonged to her. He further argues that since the DVD was never authenticated as a pornographic video and the complainant prevented him from ascertaining whether inappropriate material was being played, it cannot be considered evidence.

CONCLUSION

It is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. See *N.J.A.C. 4A:7-3.1(a)3*. *N.J.A.C. 4A:7-3.1(e)* provides, in pertinent part, that supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer (EEO/AA), or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination. For purposes of this section and *N.J.A.C. 4A:7-3.2*, a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member. *N.J.A.C. 4A:7-3.1(d)* provides, in pertinent part, that all employees are expected to cooperate with investigations into claims of discrimination/harassment and that failure to cooperate in an investigation may result in administrative and/or disciplinary action, up to and including termination. *N.J.A.C. 4A:7-3.2(m)4* provides, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Commission has conducted a review of the record and finds that the EEO conducted an adequate, though untimely investigation, which included several interviews and the review of relevant documents. The appellant, a supervisor, admitted on appeal that although the complainant alleged that M.B. had engaged in sexual harassment and was showing a pornographic movie, he advised her to discard the DVD, as evidenced by his June 13, 2009 report of the incident. However, under the State Policy, supervisors have an affirmative duty to immediately refer allegations of prohibited discrimination or harassment to the EEO/AA Officer or any other individual designated to receive complaints of workplace discrimination or harassment. Supervisors are held to a higher standard under the State Policy and must report both alleged violations reported to them and those directly observed by them. A supervisor's role under the State Policy is to make every effort to maintain a work environment that is free from any form of prohibited discrimination and harassment. See *In the Matter of Paul Grayson* (CSC, decided October 6, 2010); *In the Matter of Richard A. Sheppard* (MSB, decided December 17, 2003) (A Senior Correction Officer's suspension was increased from 30 days to 120 days for his violation of the State Policy and the appointing authority was directed to conduct an investigation and take appropriate disciplinary action against three supervisors, one of whom clearly did not follow the State Policy in reporting the allegations of sexual harassment against the Senior Correction Officer). Therefore, the appellant's advice to an employee to discard evidence of a potential State Policy violation brought to his attention was improper and inconsistent with his supervisory obligation to report allegations of discrimination

or harassment. The appellant's action cannot be condoned since a supervisor's advice to discard evidence of a potential State Policy violation could compromise an EEO investigation and undermine this State's commitment to ensure that every State employee and prospective State employee is provided with a work environment free from prohibited discrimination or harassment. Moreover, regardless of whether the appellant actually witnessed the alleged inappropriate behavior, he was required to promptly report the matter to the EEO officer. Furthermore, in advising the complainant to discard evidence of a potential State Policy violation, the appellant was interfering with an investigation and, thus, violating his duty under *N.J.A.C. 4A:7-3.1(d)* to cooperate with investigations. Thus, since the purpose of the State Policy is to be instructive and remedial in nature, the written warning issued to the appellant was appropriate. While the appellant also posits that the EEO timed the issuance of its determination to retaliate for the appellant's PEOSH complaint, there is insufficient support in the record to indicate retaliation. In this regard, the EEO denies that it had any knowledge of, or interest in, the PEOSH complaint, the appellant acknowledges that the timing of the determination may have been coincidental, and no substantive evidence of retaliation has been presented. Accordingly, the investigation was thorough and impartial, and no basis exists to disturb the EEO's determination.

The matter of the delay in the investigation and the issuance of the determination must be addressed. Although the appellant contends that he has been prejudiced by the delay, there is no indication of prejudice in this particular case. In this regard, as discussed above, the Commission has determined that the EEO's investigation was adequate. Moreover, on appeal, the appellant submits a copy of his own original report of the incident in which he wrote that he advised the complainant to discard the DVD, and as also discussed above, the Commission agrees with the EEO that that advice was improper. Nevertheless, *N.J.A.C. 4A:7-3.2(l)* states, in pertinent part, that the investigation of a complaint shall be completed and a final determination shall be issued not later than 120 days after the initial intake of the complaint. 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. Additionally, *N.J.A.C. 4A:10-2.1* states, in pertinent part, that where there is evidence of a violation of or noncompliance with Title 11A, New Jersey Statutes, or Title 4A, *N.J.A.C.*, the Commission may assess costs, charges and fines not to exceed \$10,000. In the instant matter, the EEO explains that backlog, minimal staff and inefficiencies in investigative and case management techniques contributed to the nearly five-year delay in the issuance of the determination. While the Commission is mindful of the EEO's efforts to reduce its backlog, its reasoning for issuing such an untimely determination is unacceptable. The Commission notes that the time frame set forth in *N.J.A.C. 4A:7-3.2(l)* is not for administrative convenience of the appointing authority. Rather, this time frame is

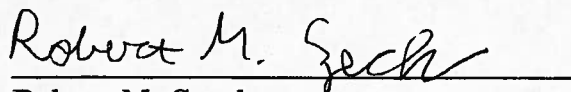
an important part of the State Policy. By requiring determinations to be issued, at most, within 180 days of a complaint, if a violation is found, action can be taken relatively quickly to help prevent future violations. Otherwise, an individual could be a repeat offender of the State Policy for years before any action is taken. Additionally, investigations can become compromised if not completed timely as witnesses may retire or be otherwise difficult to locate, memories fade, and evidence disappears with the passage of time. Further, it is unfair to the accused to have allegations hanging over their heads for years, and it is unfair to accusers to have to wait years for a resolution. Moreover, as previously noted in *In the Matter of Sonia Smith, Department of Human Services* (CSC, decided September 19, 2012), the Commission has warned DHS numerous times about strictly complying with the time frames set forth in *N.J.A.C. 4A:7-3.2(l)*. In *Sonia Smith, supra*, the Commission reviewed the matter thoroughly and found that the reason for the delay was unacceptable and that DHS had been warned repeatedly to no avail that, pursuant to *N.J.A.C. 4A:10-2.1(a)2*, future, egregious violations may result in fines up to \$10,000. Accordingly, the Commission finds DHS' actions unacceptable in light of the State Policy and the Commission's past warnings. Therefore, DHS shall be assessed a fine of \$1,000 for its violation of *N.J.A.C. 4A:7-3.2(l)*. See e.g., *In the Matter of S.J., Department of Human Services* (CSC, decided April 9, 2014) and *In the Matter of S.L.-W., Department of Human Services* (CSC, decided March 4, 2015). Any future violations may result in increased fines up to \$10,000.

ORDER

Therefore, it is ordered that this appeal be denied. Further, the appointing authority is fined \$1,000 for its untimely investigation to be remitted within 30 days of the 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 15TH DAY OF APRIL, 2015



Robert M. Czech
Chairperson
Civil Service Commission

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and
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Attachment

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